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THE

# LAW

OF

# Bistresses and Replevins,

DELINEATED.

WHEREIN THE

Whole LAW under those Heads is confidered; what Things may, or may not be distrained; and the regular Method to be pursued in suing out REPLEVINS, &c. agreeable to the present Practice.

With many References to the best Authorities.

#### BYTHE

Late Lord Chief Baron GILBERT.

To which is added,

An APPENDIX of English Precedents in REPLEVIN.

#### In the SAVOY:

Printed by HENRY LINTOT, Law-Printer to the King's most Excellent Majesty; for J. WORRALL, at the Dove in Bell-Yard, near Lincolns-Inn; and B. Tovky in Westmin-ster-Hall. M DCC LVII.

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With many Reductions to the lost Authorite

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#### In the SAFOT:

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# PREFACE.

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S Solidity of Judgment, Utility of Matter, and Perspicuity of Method, will be too obvious to every intelligent Reader, on the first Perusal of the following Treatise, not to convince him that it is one of the elaborate Pieces of the late Lord Chief Baron GILBERT, we presume there needs no further Apology for making it public, especially fince it is a Subject essentially necessary to be known by every Individual who has any Kind of Inberitance or Possession; for it is calculated in such a Manner as to be of Use to the Public in general, general, but more particularly to Sheriffs, Undersberiffs, Stewards, Landlords, Tenants, &c. who ought to be thoroughly acquainted with this Branch of the Law.

The Translations at the Bottom of the Pages are intended that this Book may be useful not only to Gentlemen of the Law, but to such also as are unacquainted with the Original.

An Appendix of some well chosen Precedents is added for the Ease of the Practiser, and the Whole rendred the best and compleatest Book of its Kind.



to the Public on

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# REPLEVINS.

Of the Distress.

ven to the Lord to recover the Rent or Services which the Tenant bath obliged himfelf by his feudal Contract to pay by way of Retribution for his Farm.

B Thefe

Spel.Rem.40. Bacon on Government 47.

These Services, when the feudal Tenures prevailed, were chiefly of two Sorts, either Military as attending on the Lord in War, or Ministerial as attending his Courts in Time of Peace, and there affishing the Lord in the Distribution of Justice, or ploughing and tilling his Demesne.

Vigel. 257, 271. Jur. feud. Ann. 126, 129. The Non-performance of these Services was by the old seudal Law a Forseiture of the Feud. This is evident from several Passages in Vigellius (under Title, \* Causa ex quibus seudum amittitur) Si Vassalus Domino non serviat, sidelitatemque ei non prasset — Si Vassalus a Domino in jus vocatus non venerit — Si pactum seudi non servetur — These, says he, were all Forseitures, and the Lord on such Failures of his Tenant was at Liberty by that Law to re-assume his Feud.

The



District is a Kerry

<sup>\*</sup> The Causes for which the Feud was lost. If a Vassal does not serve his Lord, or is not faithful to him.——If a Vassal being summoned by his Lord to a Court of Justice, does not come.——If he break his seudal Agreement.

The Rigour of this Law was mitigated with us, and these feudal Forseitures changed into Distresses according to the pignorary Method of the Civil Law, from whence the Notion seems first to have been borrowed, as may be seen in the Title, \* De distractione Dig. lib. 20. pignorum, Creditoris arbitrio permittitit. 5. fol.660. tur ex pignoribus sibi obligatis quibus velit distractis ad suum commodum pervenire: For there appear no Footsteps of it in the seudal Authors.

From whence soever the Name of Notion came, the Remedy obtained so early in our Law, that we have no Memorial of its Original with us; and as this Power was anciently used by Lords, it grew as burthensome and grievous to Tenants as the seudal Forfeiture, there being no Difference to the Tenant, between the Lord's seizing the Land itself, and turning the Tenant

Of the Obligation of Pledges. The Creditor may at his Choice come at his Interest from either of the Pledges that were bound to him.

#### The Law of DISTRESSES.

out of his Possession, and his stripping him of the whole Produce or Fruits of it at his Pleasure.

And not only the Produce of the Farm, but the Industa & Illata, and every Thing that was brought on the Land were liable to the Lord's Distress: By this Means all the Plunder of the War, which the Vassal had brought home was often carried off by the Lord, and the Distress by his Power removed out of the Reach of the Tenant; and all this on the slightest Occasions.

This Power, as it was practifed by the Lords, did not only oppress the Tenants, but put them so entirely under the Power of their Lords, as to enable them to bring great Numbers of their Vassals into the Field against their Prince, and thereby disturb the publick Peace of the Kingdom.

There were yet two other Inconveniencies which arose from the Abuse of these Distresses.

The first was, that in the Disputes and Contests which frequently arose between

between neighbouring Lords themselves, whilst each Lord was endeavouring to enlarge his Bounds and encroach on his Neighbour's Property, the Tenants were generally distrained by both, by which the Tenant was brought within the Seignory, and so became subject to that seudal Dependence and Service which accompanied the Military Tenure.

The other Mischief was, that when the Lords had brought them under their Dependence, they would distrain them for the Amerciaments of their Courts; and as the Statute of Marl-bridge expresses it, \* Graves ultiones fecerint, et districtiones quousque redemptiones receperint ad voluntatem suam: And what made these Abuses the more insupportable, was, that these Lords † per Ministros Domini Regis 2 Inst. 102, 3. justiciari non permittant, nec sustineant

\* Would take severe Revenge and Distresses until they had received Fines at their Pleasure.

<sup>+</sup> Would not be justified by the Officers of the Lord the King, nor suffer them to deliver the Distresses they had taken by their own Authority at their Pleasure.

quod per ipsos liberentur districtiones quas authoritate propria fecerint ad voluntatem suam: So that they seemed to throw off the Authority of the Law, and to subvert the fundamental Rule, that no Property was to be altered without the King's Writ.

But these Opressions ended with the Distractions of the Barons Wars; for towards the End of the Reign of towards the End of the Reign of the Albert 1. 3. Hen. 3. there were particular Laws made to regulate the Manner of distraining, and not to suffer the Lords to extend this Remedy beyond the Mischief it was first introduced for, which was no more than to empower the Lord by seizing the Chattels, to oblige the Tenant to perform the feudal Services.

These were to remain in the Lord's Hands as Pledges to compel the Performance, and the Detention was no longer lawful than the Tenant refused to do the Services which were reserved by the seudal Contract; and by what Steps it came to be brought under the Regulations which govern it at this Day,

Day, we shall have Occasion to obferve, by confidering,

- I. The several Sorts of Distresses, and in what Cases a Distress lies.
  - II. What Things are distrainable.
- III. How the Diffress is to be used; and herein of the Pound, the Place appointed by Law for the Custody of the Pledge or Diffress.
- I. The feveral Sorts of Distresses, and in what Case a Distress lies.

The Distress at Common Law was used in fix Cases, viz.

1. For the Services due to the Lord 1 Ro. Abr. arifing from the Tenure, as Homage, 665. Fealty, Rent, Suit of Court, &c. for the Distress, as is already observed, came in the Place of the Forfeiture, and was a mild Alteration of the feudal Law, which allowed the Lord to feize the Feud for the Non-performance of the Services.

So resigned & B 4 man and lot of So

1 Ro. Abr. 665. 4 Co. 49. b. 1 Jon. 132, 133. Latch 129. or pur faire fitz Chevalier, the Lord may distrain; for these were Parts of the seudal Profits, the they were not annual, and therefore recoverable in the same Manner.

But it may here be necessary to distinguish the Relief into the Relief proper and improper.

Co, Lit. 83.2. Spelm. Rem. 32. I Jon. 132, 133. Latch 130. 3 Bulft. 323. Plowd. Com.

The proper Relief is the ancient Relief, which was due to the Lord at or before the Entry of the Heir, or new Tenant into the Land. This was anciently paid in Money, and was not fo properly a Service as a Perquifite or Incident to the feudal Tenure, and arose from this, that whilst the Feud was temporary and precarious, the Lords used upon the Death of their Tenants, and before the Heir was admitted into the Feud, to oblige the Heir to pay a Sum of Money. This, after the Feud came to be established, and made perpetual, came to be Part of the seudal Profits, the Tenants easily consenting to it upon the Establishment of the Feud.

Relief for marrying the Daughter, or for making the Son a Knight.

In Analogy to this, the Lords, after \* Magna Charta indulged to the Tenants the Licence of Alienation, used in their Grants to referve a Sum of Money on every Alienation of their Tenants; and where fuch Refervation appeared in their Grants with a Clause of Distress, the Lord might refort to that Remedy where the Tenant failed to perform his Part of the Contract. It afterwards happened that these Grants in which these Reservations appeared, were by length of Time worn out or loft, and then the Lords prescribed in taking the Relief; but for these prescriptible Reliefs, the Lord could not diffrain, unless he could likewise prescribe in the Distress: For as the Prescription created the Right to this improper Relief, fo there must be a Prescription to give the Remedy; for otherwise they were looked upon as Burdens and Exactions of the Lords upon their Tenants, and tended to difable them from appearing in the Field armed and equipped for the publick Service, and for that Reason were said to be against common Right; that is, against the

<sup>\*</sup> The great Charter.

#### The Law of DISTRESSES.

Policy of the Law, which provided for the publick Safety, before the private Profit of the Lord, and therefore were not encouraged, nor any Remedy either by Distress or Action given for them, unless the Lord could shew as early a Title to the Remedy as he did to the Duty itself.

In like Manner the Heriot is of two Sorts, the Heriot Service and the Heriot Custom.

Spelm. Rem. 32.

The Heriot now is the best Beast of the Tenant, but anciently was taken out of the \* Militiæ apparatus, and was a Device first introduced to keep a conquered Nation in Subjection, and to support the publick Strength and military Furniture of the Kingdom, by taking on the Death of the Tenant his best Armour; and hence it became Part of the Services arising from the Tenure, and therefore to be distrained for as other Services. This, as the military Service declined, was turned into something of private Profit to

<sup>\*</sup> Military Apparatus.

the Lord; and, instead of the \* Militiæ apparatus, they took the best Horse, Ox, or Cow; and the same Remedy was continued as where the Heriot was paid in the Habiliments of War.

The Reservation of this Heriot Ser-Bro. Abr. tit. vice was not only of publick Utility, 8. but also for the private Sasety of all Keilw. 82. a. the Tenants in the Manor, that the Habiliments of War should be kept amongst themselves for their Desence, and therefore where there was no such Tenure between the Lord and Tenants of some particular Manor, the Tenants by Agreement consented that the Lord should have the best Part of the military Furniture; and this Agreement created a Custom, which being the Law of the Manor, created a Right to the Lord to seize.

But the Lord could not distrain, because where-ever there was any Footsteps of a Distress, it was always supposed to be Part of the seudal Re-

Military Apparatus.

fervation: And the Heriot Custom arifing originally from the Grant of the Tenant, and not referved by the Lord upon his feudal Donation, was not a Service arising from the Tenure between Lord and Tenant, and therefore was not under the Regulation of feudal Services, and consequently not to be distrained for, as these Services were.

Keilw. 82. a. Heriot, pl. 7. 2 Inft. 182. Show. 81. Salk. 356. Cro. Car. 260.

But where such Heriot Custom ob-Bro. Abr. tit. tains, the Property of the Heriot is actually in the Lord upon the Death of the Tenant, because the Choice of the best Beast is in the Lord, and not in the Tenant: And hence it is, that the Lord may feize the Heriot Custom wherever he finds it, either on the Tenant's Land or off it, or even in the King's Highway. And if it be eloigned, he may have Trespass or Detinue for it, for the bringing the Action determines the Choice for that Beast, as if he had seized at first; and whoever takes it violates the Property, which was vefted in the Lord by the Death of the Tenant; but in the Cafe of fuch Eloignment the Lord cannot distrain the Tenant as he may for the Heriot Service, because the Diffress

was introduced for the Recovery of feudal Duties, of which the Heriot Custom is no Part.

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But it hath been much doubted Plowd. Com. whether the Lord might seize the 96. Keilw. 82. a. Heriot Service, because that being Part Bro. tit. Her. of the feudal Duties arising from the pl. 7. Tenure between the Lord and Tenant, 3 Bulft. 325. ought to be governed by the same Re- 74.
gulations with the other Services; and Moor 540. therefore if where the Tenant holds by Show. 81. a Capon or a Hen, &c. the Lord must 2 Lutw. 1367. diffrain, and cannot feize as for his own Property, so neither aught he to feize for a Heriot Service. But this Point feems now fettled, that the Heriot Service is seizable as well as the Heriot Custom, because the Choice of the best Beast is in the Lord, and therefore he only is to determine that Choice by a Seizure; but where the Tenure is by the Rent of a Hen or a Capon, &c., he is to render, and therefore the Lord can only compel him to do it by Distress.

2. The second Sort of Distress is for Cro. Jac. 382. Fines and Amerciaments in Court 664.

Leets; and this stands upon a different 8 Co. 38, 41.

Bottom; 11 Co. 45.

## 14 The Law of Distresses.

Bottom; the former Distress only relates to private Contracts between Landlord and Tenant; this Distress relates to the Transactions in a Court of Justice, and is allowable either for a Fine imposed by the Steward, or for Amerciaments assessed by the Jury on Persons guilty of Nusances, or of any other Crime presentable or conusable in the Leet.

But for Amerciaments in a Court Baron, the Lord cannot distrain, but is put to his Action of Debt for Recovery thereof.

To understand this rightly, we must observe that Court Leets were originally derived out of, or rather Exemptions from, the Sheriffs Torn, and therefore are Courts of Record as the Torn is.

In those Leets, though the Lord of his Steward presides as Judge, yet the Court is \* Curia Domini Regis, and was at first established to punish Trespasses and publick Nusances, which

<sup>\*</sup> The Court of the Lord the King.

arose within the Precincts of the Leet, as the Torn did through the whole Kingdom. Hence it comes that in all Things necessary for the Support of the Jurisdiction of the Court, the Judge was armed with the fame Power with the Judges above, and therefore the Steward for any Contempt in Court might impose a Fine, and imprison for it, as the Judges above; because, what is necessary for the Vindication of the Honour of the Court, the Steward is not obliged to go to a superior Court to feek Redress for; but for an Amerciament, which is imposed for any Transgression out of Court, of which the Court has Cognizance, there was no Fine or Imprisonment, because that Court could only try lesser Offences, which were not fineable, the greater Offences being remitted to the Justices in Eyre; and this Fine for Contempt in Court when imposed, being grounded on the Judgment of the King's Court of Record, created a Debt for which the Steward might either imprison or levy the same on the Goods and Chattels of the Debtor; but for the Amerciaments the Steward could only distrain, and not fine and imprison.

The

Dalt. Sher. 401. Finch 125. 8 Co. 41. b.

and with a the licenses of the The Process that levies this Debt, is in the Books called a Diffress because the Lord might at Common Law impound the Diffres until the Fine was paid, but as the Distringas or Levari for levying those Fines and Amerciaments issued in the King's Name; and as the Lord may likewife fell this Diffres, it is rather to be esteemed in the Nature of an Execution, than a Distress in the genuine Sense of the Word; the Diffress originally being no more than a Pain on the Tenant, and a Pledge in the Lord's Hands to compel the Tenant to perform the Services, and therefore could not be fold, till the Stat. 2 W. & M. c. 5. Court could contain the later Offices.

the Steward may impose a Fine upon a Man for resulting to be sworn a Constable, and may distrain for that Fine.

Dalt. Sher.

So if a Man oweth Suit to the Sheriff's Torn, and refuseth to be sworn, or if a Bailiff of a Leet refuseth in Court to execute his Office; these are all Contempts to the Authority of the Court

Court, and the Steward may impose a Fine, and levy it by Distress of the Offender's Goods.

So if a Man oweth Suit to the She-Dalt. Sher. riff's Torn, and doth not make his 401.

Appearance, he may be amerced and Bro. tit. Diffr. pl. 8.

distrained for the same, because it is a Fitz. Abr.

Contempt to the Court in resusing tit. Avowry,

Obedience to their lawful Commands:

But Qu. whether this be properly an

Amerciament.

The Difference between Fines and Amerciaments is, that the Fine was \* pro gravioribus delictis, the Amerciament + pro minoribus.

The || graviora delicta were punished either by the View of the Judge himfelf, as Fines for Contempts done in Courts, or on a View of Nusances, but out of Court by the Justices of the Peace, or upon Indictment, or other Conviction.

<sup>\*</sup> For greater Offences.

<sup>+</sup> For less.

Greater Offences.

Of such \* graviora delicta, the Fine is fet by the Court itself, because such \* graviora delicta must be against the King's Peace, the Quantity of which the Court are Judges of, who have Commission from the King to see that fuch Peace be preserved; and therefore in fuch Cases, the Jury are only Judges whether the Defendant be guilty of the Fact or not; but the Court is Judge of the Quantity of the Fine, and therefore it is called a Fine, because it ends with the Court; and is not to be affeered by the Jury.

But in + minoribus delictis, as for not appearing at the Court Leet or Torn, the Judge may order the Jury to affeer an Amerciament on fuch a Defaulter, and iffue a Distringas for levying the same.

But it feems that at the Affizes and Seffions where the Judges and Justices fit by an immediate Commission from

siel to I +

· \* Greater Office coal

Greater Offences.

<sup>†</sup> Less Offences.

the King to keep the Peace of the County, the Non-appearance of Suitors to make Enquiries for Breaches of the Peace is among the \* graviora delicta; fo that there the Court hath Power of itself to impose a Fine which must be estreated into the Exchequer to be levied.

And so where the King grants to any Corporation a Power to hold Sessions, if such Court fines for Non-appearance, such Fines must be estreated into the Exchequer, and levied by the Process of that Court; and such Corporation, though they have the Grant of such Fines from the Crown, cannot get them out of the Exchequer but by Petition, or + Monstrans de Droit.

But if instead of fining such Persons, the Sessions shall order that they be amerced, and the Jury affeer the Amerciaments, it may be levied by Distringus.

<sup>\*</sup> Greater Offences.

<sup>+</sup> Shew of Right.

Cro. Eliz. 748. But Court Barons were instituted for the private Advantage of the Lord, and the Ease of the Tenants of the Manor, this is \* Curia Domini Manerii, in which the Suitors are Judges, and therefore their Amerciaments being imposed only for the Lord's Advantages, and for not doing Suit to his Courts, or performing the Services due to him, fuch Amerciaments are not grounded on the Judgments of the King's Courts, or Courts of Record, and therefore only created a Debt for the Lord to be fued for in the King's Court, that the Justice of it might be controverted in the King's Court, and therefore the Law never allowed the Lord to distrain for those Amerciaments in either of the Ways abovementioned: For the Lord ought not to have a Distress for them in the Nature of an Execution, because that were to alter Property without the King's Writ, or the Process of the King's Courts; nor was it reasonable to allow the Lord to diffrain and im-

<sup>\*</sup> The Court of the Lord of the Manor.

pound

pound for these Amerciaments, because they were fet (among other Caufes) for not doing Suit to the Lord's Court, and other Services arising from the feudal Tenure, and were in Nature of a Penalty inflicted on the Tenant for the Non-performance thereof; but for these the Lord might distrain by Virtue of the feudal Grant, and therefore ought not to distrain for the Amerciament too, for that were in Effect to allow the Lord a double Diffress for the same Thing, for the Service itself, and for the Amerciament, which is the Penalty for the Non-performing that Service, which were vexatious, and would put the Tenant too much in the Power of the Lord.

But if the Lord can prescribe in a 11 Co. 45. 2. Distress for the Amerciament, then the Ro. Abr. 666. Distress becomes lawful, because such Prescription is presumed to be founded on a Grant of the Tenants, by which they subjected themselves to the Distress, and though the Grant be worn out by Length of Time which created the Distress, yet the continual Usage is a good Evidence of it, and therefore the Tenants must submit to that

Custom which their Ancestors put

Cro.Eliz.748. Rowleston v. Alman.

But if the Manor belongs to the Crown, the King by his Prerogative may distrain the Tenants for Americaments imposed in his Court Baron without Prescription, because it is of publick Advantage that the King's Treasure should be collected in the most expeditious Manner.

There is, however, this Distinction to be observed in Fines imposed by a Court Leet itself; for they are either imposed by a Steward for a Contempt to the Court, and this is absolutely necessary for the Support of the Authority and Dignity of the Court within the Boundaries of their Duty; or else they are imposed as a Punishment on those Crimes which are conusable by the Court: But where by Custom the Leet hath Jurisdiction to impose a Fine, for a Thing not originally within the Jurisdiction, but only acquired by Cuftom, in fuch a Cafe, as that particular Custom gave the Leet a Right to impose the Fine, so the Custom only can create the Right of Distress.

Thus

sarround the Dilless, and

Thus where a Leet laid a Custom Vent. 105. for a Township to send one to be Ridge. sworn Constable, which not being Raym. 204. done, a Fine was imposed, and a Di-S.C. stress taken for it, the Distress was held unlawful, because there the Steward of the Leet did not prescribe in the Distress, and nothing else would warrant it.

So it is, \* pro Certo Letæ, which 11 Co. 44. 2. was a Sum given by the Tenants to Rol. Rep. 32. reimburse the Lord for the Purchase Case. of the Leet; the Lord cannot distrain 2 Leon. 74. for it without a Custom to warrant the 3 Leon. 178. Distress, because this is a Sum purely of private Advantage to the Lord, and in no fort necessary to be paid to keep up the Jurisdiction of the Court.

But for Fines and Amerciaments in 8 Co. 41. b.
Leets, the Lord may either distrain and
fell the Distress (and then the Distress
is in Nature of an Execution of the
Judgment of a Court of Record) or

For a Fine in a Court Leet.

else he may impound the Distress, and then it is replevisable.

And here it may not be improper barely to mention another Sort of Diftress, which is the last and great Process in Courts of Judicature, to bring the Desendant into Court, and oblige him to appear in Civil Cases in Actions as well real as personal.

This Process, and the Attachment which precedes it, lies as well in inferior Courts, not of Record, as in superior Courts, and is given when the Defendant has been summoned to appear and makes Default, then goes the Attachment, which is not a Process against the Body of the Defendant, but against his Goods and Chattels: For the Officer attaches the Defendant by his Horse, his Ox, or Cow, and where this Process issues out of a Court of Record, there is no doubt but if the Defendant makes Default, the Goods he was attached by are forfeited, because in such Case there is a Judgment of the King's Court of Record condemning the Goods, which alters the Property.

Dalt. Sher. 417. Booth 8. Dyer 199. pl. 54.

And

And it seems that in the County Kitch. 155.
Court and Court Baron, which are not Dalt. 418.
Courts of Record, if the Desendant Bro. tit. Court does not appear upon the Attachment or Distress, the Goods by which he was attached or distrained are likewise forfeited on his Desault. The Reason why in this single Instance the Property is altered without the King's Writ, or the Judgment of a Court of Record, seems to be for the more speedy Administration of Justice, which is of publick Advantage, and the Party by his Appearance might have prevented the Forseiture.

And here we may likewise observe, that where the Plaintiff recovers in the County Court, or Court Baron, the Execution is only by Distress, that is, there issues a Precept to the Officer of the Court to take the Goods of the Desendant, and keep them in Pound, until the Desendant satisfy the Plaintiff of his Debt; the Reason is because these are not Courts of Record, being held only in the Lord's or Sheriff's Name, and therefore all the Processes run in their Names and not in the King's,

King's, and without the King's Writ no Property can be altered; so that the Execution in these inserior Courts only seizes and detains the Desendant's Goods until he makes the Plaintiss Satisfaction for his Debt; and therefore we find in the Register the King's Writ \* de Executione Judicii of these inserior Judgments, and by Virtue of that they may levy the Plaintiss's Debt as if he had recovered it in a Court of Record.

In the Lord's Court if the Defendant does not appear to do Justice to the Complainant on the Summons, on the next Process he ought to give Pledges or Caution for his Appearance, and therefore upon the Attachment they may return him attached + per Plegios, and then if he don't appear his Pledges shall be amerced, for which Amerciament the Lord may have his Action of Debt; and if the Defendant cannot find Pledges, the Attachment is per Vadios; and fince the

sheir Name

<sup>\*</sup> Of Execution of the Judgment.

<sup>+</sup> By Pledges.

By Gages.

Lord would have had the Amerciament if the Defendant had been attached, and by Pledges, and had not appeared, therefore if he be attached \* per Vadios, and do not appear, the + Vadii are forfeited; for the + Vadii come instead of the | Plegii, and therefore are hypothecated for his Appearance in Judgment of Law; and by Consequence if he doth not appear to perform the Condition of fuch Pignoration, the + Vadii are forfeited; and therefore the Defendant where he is attached \* per Vadios, may before the Day of his Appearance replevy the + Vadios, and put in Pledges who are answerable for his Appearance, and if he makes Default are amerced.

But if there be a Levari for a Debt recovered in the Lord's Court, there the Goods are not forfeited on the Return, because after Judgment he hath no Day to appear, and therefore there can be no Forseiture arising to

<sup>\*</sup> By Gages and a decirument 10 4

<sup>+</sup> Gages.

Pledges.

the Lord nor the Party, because he was not bound by his Fealty to do any such Act to the Party recovering, and consequently here the Lord only seizes the Chattels of his Tenant to make him pay his Debts; but the Plaintiss must apply to the King's Court to have the Property altered by a Writ \* de Executione Judicii, and so hath a compleat Remedy for his Demand.

But if the + Vadii were not to be forfeited on mean Process, the Tenant would let such Goods lie till he at his Leisure could come in to contest the Debt, which would tend to the Delay of Justice.

And here note by the Way the Lord's Distress for Rent in Nature of a prerogative Process to take the Goods and Chattels of his Debtor in the first Instance without any Summons, but at the next Court Day such Distress is not forseited to the Lord, if not reple-

+ Gages.

Of Execution of the Judgment.

vied, because then he would judge of Forseitures in his own Cause.

But if the Tenant was aggrieved he must apply to the King who is the Lord Paramount, and the Complaint is, that he was distrained \* contra Vadios & Plegios, that is, when he was ready to give good Security to contest the Lord's Debt, and therefore the Judgment in Replevin is of Return irreplevisable, that is, that the Lord has a just Cause to detain, that such Prerogative of the Lord's should take Place till the Debt be satisfied.

3dly. A third Case where a Distress lies is for Toll in Fair or Market.

And here the Law is clear, that Ro, Abr. 666. where a Lord hath a Fair or Market Raym. 233. by Prescription, and hath used to take Toll of the Cattle sold, if such Toll be not paid, the Lord may seize any of the Cattle sold, and retain them till Satisfaction be made him for the Toll; for the Prescription is built on a

<sup>\*</sup> Against Gages and Pledges.

Grant of the King's, which by Length of Time is supposed to be worn out, and that Grant was originally made for publick Utility, Fairs and Markets being instituted for the more convenient fupplying the Subject with the Necessaries and Conveniencies of Life; and therefore every Subject that buys there, may very reasonably be charged for that Conveniency with a moderate Toll; and the Lord hath the Advantage of the Toll as a Compensation for the Mischief done to his Soil by the Beafts fold: And as the Lord might have distrained the Beasts for \* Damage Feasant, if he had not such Eair, so he may distrain for the Toll, which is in Nature of a Compensation for that Damage; and hence it should feem reasonable that where the Fair or Market subsists meerly by Grant from the Crown, as where the Fair is newly created by Grant, and Toll thereby given to the Grantee, that he may distrain for such Toll; for + qui fentit Commodum sentire debet & Onus;

\* Doing Damage.

<sup>†</sup> He who has the Advantage should also have the Burden.

and an Action of Debt would be no Remedy; but this Diftress is only a Pledge to be detained till Satisfaction made, and doth not feem to be within the Statute to be fold.

Diffrest where the Parties athly. If a Township be amerced, Dr. & Stud. and they by Consent affess a certain 9. Sum on every Inhabitant for the raifing thereof, and likewise agree that if it be not paid by fuch a Day, that certain Persons appointed for that Purpose by the Township shall distrain for the Sum affeffed on each Inhabitant. This is a lawful Distress, because consented and submitted to by the Agreement of those Persons who are to pay the Tax; and the more reasonable, because the raising the Tax in that Manner is for the Ease of the Inhabitants, in regard the publick Officer must otherwise levy and collect the Amerciaments.

5thly. A Penalty inflicted for a 5 Co. 64. a. Breach of a By-Law may be levied by Clarke's Cafe. Ro. Abr. 366. Distres; but this only in Case where Dyer 321. pl. fuch Remedy is appointed for Recovery 23. thereof by the Power that made the By-Law, and at the Time the By-Law was made, because the By-Law only binds

binds the Members of that Community who make the Law, and therefore the Affent of every Member is prefumed in the Institution of that Law, and confequently the Penalty may be recovered by Diftress where the Parties themselves have agreed to that Remedy; but unless the Distress be expressly provided for by the Corporation, the Penalty can be recovered but by Action of Debt; but the Subject cannot be imprisoned for the Breach of any By-Law, though it be so expressly ordained by the Power that made the By-Law, because such Imprisonments are against \* Magna Charta, and therefore the By-Law appointing it is fo far void as being against the Law of the Land.

But where the Corporation can prefcribe in the Distress, they may lawfully distrain for the Penalty, because the prescriptible Right is grounded on a By-Law originally appointing that Remedy for Recovery of the Penalty, and therefore is good though the By-

<sup>\*</sup> The great Charter.

Law on which it is grounded be by Length of Time worn out or loft.

6thly. A Man may distrain Beasts Fleta tor. \* Damage Feasant. This (according Bro. tit. Diftr. to Fleta) is grounded on a particular Custom of the Realm, + Si dicere poterit Captor, fays he, quod Juste cepit averia quia invenit illa in fua, & fecundum Consuetudinem Regni imparcavit illa donec damnum suum fuerit emandatum. But from whence this Notion was borrowed, or whenever introduced, 'tis highly reasonable that the Owner of the Land should defend himfelf from Injury by driving out the Beafts, and likewife detaining the Thing that did the Injury in a publick Pound, till Compensation be made for the Trespass; for otherwise the Person injured might never find the Person whose Beafts committed the Trespass.

\* Doing Damage.

<sup>†</sup> If the Captor (fays he) could fay that he took the Beafts justly, because he found them upon his Demesnes, and according to the Custom of the Realm impounded them until he had Recompence for his Damage.

## II. What Things are diffrainable.

Bro. tit. Diftr. The Diftress, as is already observed, was anciently no more than a Pledge in the Hands of the Lord to compel the Tenant to pay the Service or perform the Duty for which it was taken, and therefore at Common Law could not be sold, but like all other Pawns or Pledges was to be restored to the Owner when the Service or Duty was performed.

The Nature then of contracting by Pawns or Pledges being that upon Payment of the Money for Security whereof they were given, the Pawn or Pledge ought to be restored to the Owner in the same Plight and Condition it was delivered——It follows,

Ro. Abr. 666.

(H.) pl. 4. Ift. That Money cannot be diffrained, except it is in a Bag, for then the Knowledge of the Bag, especially if it be sealed sufficiently, secures the several Pieces of Money therein, so as the same individual Pieces may be restored on Redemption of the Pledge.

2dly. Sheaves of Corn at Common i Jones 197. Law could not be taken as Pledges for Cooper v. Rent, because all Pledges were to be Ro. Abr. 666, returned in the same Plight and Con- 667. dition as they were taken, for these Sid. 440. shed and scatter the Grain by being removed, and confequently cannot be restored in the same Condition upon the Redemption. For the same Reafon Hay in a Cock or Barn could not be distrained; yet at Common Law Corn or Hay in a Cart might have been distrained together with the Cart itself, because then the Pledge might have been removed without Damage to the Owner, and might likewise be restored in the same Condition it was taken, the Whole being removed with the Cart; but this Law was found inconvenient to Landlords, and too great an Encouragement to Tenants to withhold their Rent, and therefore 'tis provided by Stat. 2 W. 3. c. 5. That it shall 7 W. 3. c. 22. be lawful for any having Arrear of in Ireland. Rent to seize and secure any Sheaves or Cocks of Corn loofe in the Straw or Hay lying in any Barn or Granary, or upon the Hovels, Stack or Rick, or otherwise upon any Part of the Land

or Ground charged with such Rent, and to lock up or distrain the same in the Place where it shall be found in the Nature of a Distress until the same shall be replevied, &c.

Co. Lit. 47. Dyer 312. 2 Inft. 132, 565.

adly. Utenfils of a Man's Trade cannot be distrained, because this would tend to publick Inconveniencies, and to the Ruin of particular Tenants, by taking away the very Means of their Support and Prefervation, and therefore the Ax of a Carpenter, the Books of a Scholar, are not distrainable, while any other Diffress can be had. -But lest this Rule should be carried so far as to privilege the Sheep of the Tenant, and their Beafts of the Plough, they being the Materials of Husbandry, to plough and manure the Land, and by that Means the Landlord be totally disappointed of the Rents: This Matter hath been fettled by the Stat. 51 H. 3. \* De Districtionibus Scaccarii, that no Man shall be distrained by the Beafts of his Plough or his Sheep, either by the King or any other,

<sup>\*</sup> Of the Distresses of the Court of Exchequer.
while

while there is another sufficient Distress unless for \* Damage Feasant, in which Case the Thing that does the Trespass must make Compensation.

4thly. Things fent to publick Places Co. Lit. 47. of Trade, as Cloth in a Taylor's Shop, Salk. 249. Yarn in a Weaver's, a Horse in a Smith's Forge, and the like, are not distrainable; for 'tis of publick Utility Ld. Raym. that the Shops of Traders should be 386. privileged from the Lord's Distress for his Rent; for otherwise no Man could supply himself with the Necessaries of Life without the Danger of lofing them for another's Debt, and therefore the Landlord cannot distrain these Things for the Rent of the Shop.

7. S. a Clothier put Wool to B. a Cro. Eliz. Spinner to spin, and afterwards J. S. 549, 596.
Read v. Burcomes with a Horse to bring back the ley. Yarn; but B. having no Weights in his own House to weigh it, J. S. took his Horse and went with B. to the House of C. to get the Yarn weighed, and C.'s Landlord, while the Yarn,

<sup>\*</sup> Doing Damage.

D 3

was weighing, came and distrained the Yarn and the Horfe of Y.S. for C.'s Rent; but the Diftress was held unlawful, because if the Yarn had been weighed either in B.'s House, or in a publick Weigh-house, it had been unquestionably privileged for the Encou-ragement of Trade: So in this Case the Defign of bringing the Horse and Yarn into the House of C, being only in the Way of Trade, that Defign fecures them from a Diffress in the House of C. as much as if they were in a publick Weigh-house. - As a Horse that brings Corn to a Market, and is put into a private Yard while the Corn is felling cannot be distrained, because the Purpose of bringing the Horse is \* pro bono publico, and in the Way of Trade.

10 H. 7.21.b. But if a Stranger's Beasts be upon Ro. Abr. 668, the Lord's Lands by Escape or other-669.
Co. Lit. 47.b. wise, though they be not levant and 2 Saund. 289, couchant, the Lord may distrain them, 290.
See Raym. not only for Rent, but for the acciments in Leets, &c.

<sup>\*</sup> For the publick Good.

Les von die Recholdberday difficalia This Rule was observed in the Civil Law in the \* Prædiis Urbanis, but not in + Prædiis Rusticis. - But when the Forfeiture of the Feud which originally accrued to the Lord by not answering the Services was changed into a Diffress, this was thought a mild Alteration, and the Diffress was the father extended by our Law to Strangers Cattle for the Recovery of the Services, to prevent any Trick in the Tenant, who might otherwise disappoint the Lord of his Remedy by grazing and stocking the Land with other Mens Cattle: And if the Stranger suffers, 'tis thought his own Default for fuffering his Cattle to trespass on another's Soil.

And this Rule hath been carried so 2 Saund. 289. far, that if a Freeholder be bound to Longueville. repair his Neighbours Fences, and lets see Ro. Abr. the Land, and the Leffee suffers the 668. pl. 6, 7. Fences to decay, whereby his Neighbours Beafts enter and come upon his

<sup>\*</sup> Town Farms.

<sup>†</sup> Country Farms.

Lands, yet the Freeholder may distrain these Beasts thus escaped for Rent. But the Reporter observes this to be a hard Law; for though it be reasonable that the Lord of the Manor who is no way concerned in the Fence should distrain Beasts thus escaping, yet 'tis not therefore just that the Freeholder who is obliged to see the Fences kept, should be suffered to take Advantage of his own Wrong.

3 Lev. 260, 261. Foulkes v. loyce. 2 Ventr. 50. S. C. Grazier was afterwards relieved in Equity, it be-2 Vern. 129.

So it hath been held, that where a Stranger puts in his Beafts to graze for a Night, by the Consent of the Lessor. and Licence of the Lessee, yet the 2 Lutw. 1161. Leffor may distrain them for Rent due out of those Lands which he consented But note, the the Beasts should graze on, because the Consent for putting in his Beasts was not a Waiver of his Right of distraining deemed a ing, unless it had been expresly agreed Fraud in the fo; for being but a Parol Agreement Lessor. it could not alter the original Contract Prec. Chan. 7. between the Lessor and Lessee, from which the Power of distraining arises.

> Note; Those Beasts were driving to the Market of London, and only grazed one Night on these Lands on the Road; and

and it was disputed in the Case whether their being on the Road to that Market should privilege them, and it was resolved it should not, because then such Privilege must extend thro the whole Kingdom, which would lay too great a Restraint on Landlords; and the Privilege of Trade is local, and only relates to the Place where the Market is kept; therefore the safest Way is to drive all Cattle to publick Inns, and then they are privileged from all Distresses.

Miles of then Land which creates

But for a Rent-Charge the Grantee cannot distrain a Stranger's Beasts until 2 Leon. 7, 8. they are levant and couchant. For this Rent doth not stand upon a seudal Title (as the Rent-Service) but is said to be against common Right, as is elsewhere observed; and therefore the Stranger's Beasts must be so long resident on the Lands, out of which the Rent-Charge issues, that Notice may be presumed to the Owner of them, that is, they must be lying down and rising up on the Premisses for a Night and a Day, without Pursuit made by the Owner of them.

hold is Part of the Thing demiled; back

and it was disputed in the Cafe wh And it feems the Sheriff may diffrain Bro. tit. Diftr. pl. 40. the Beasts of a Stranger on my Land for the Issues forseited by me in the King's Courts for my Non-appearance for the Issues forfeited by my Default Bro. tit. Diffr. create a Debt to the King, which is to pl. 3. be levied on my Land, because the Obligation on me to appear on the Summons in the King's Courts arises from my being Proprietor of fuch Land, and I am furmmoned to appear on the Penalty of forfeiting for much of the Issues of that Land which creates the Obligation on me, and therefore whatever is found on that Land shall be answerable for the Issues forfeited by me. one orall for mon mod and

ethly. Whatever is Part of the Free-Co. Lit. 47. b. hold cannot be distrained, for what is Part of the Freehold cannot be severed from it without Detriment to the Thing itself in the Removal, and confequently that cannot be a Pledge that cannot be restored in statu que to the Owner.

> Besides, what is fixed to the Freehold is Part of the Thing demised; but

Title for the Mont-Service)

but the Nature of the Distress is not to resume Part of the Thing itself for the Rent, but only the Industa and Illata upon the Soil or House. Hence it is that Doors, Windows, Furnaces, Sc. affixed to the Freehold, are not distrainable.

So a Millstone is not distrainable Bro. vit. Distr. though it be removed out of its proper Pl. 23. Place in order to be picked; because such Removal is of Necessity, and the Stone still continues Part of the Mill. So it is of a Smith's Anvil on which he works; for this is accounted Part of the Forge, though it be not actually fixed by Nails to the Shop.

6thly. What is in the Hands and Co, Lit. 47. a. actual Occupation of another cannot be Ro. Abr. 667. Sid. 440. distrained; for that cannot be a Pledge to me which another has the actual Use of; and consequently the Distress which follows the Nature of the Pledge cannot be of those Things which cannot be reduced into the actual Possession of the Person distraining; therefore the Ax in a Carpenter's Hand, or the Horse on which I am riding, can-

not

# 44 The Law of DISTRESSES.

not be distrained, for they are for that Time privileged by Law.

Law are not distrainable; for 'tis \* ex vi termini repugnant, that it should be lawful to take Goods out of the Custody of the Law.—And that cannot be a Pledge to me which I cannot bring into my actual Possession. Hence it is that Goods distrained for † Damage Feasant cannot be taken for Rent, nor Goods in a Bailiss's Hands on an Execution, nor Goods seized by Process at the Suit of the King; nor will a Replevin lie of them.

#### 3 H. 7. 1.

But if a Replevin come after Goods are fold on the Execution, the Defendant must claim Property, for then they are out of the Custody of the Law in the Hands of a private Person.

Having thus shewn what Things are distrainable, before we come to con-

+ Doing Damage,

<sup>\*</sup> From the Term itself.

fider the Pound, which is the common Repository for all Distresses, it will be necessary in this Place to observe these Things in general of Distresses.

distrainable, it must be understood not distrainable for Rent; for all Chattels whatever are distrainable \* Damage Feasant, it being natural Justice that whatever doth the Injury should be a Pledge to make Compensation for it.—
Therefore all Chattels are liable to Co. Lit. 47. make Satisfaction for the Trespass by Sid. 440. them committed; and hence it is that the Utensils of a Man's Trade, Stacks of Corn, and the Horse on which a Man rides, are distrainable \* Damage Feasant, and the Horse may be led to the Pound with the Rider on him.

2dly. No private Person can distrain 2 Inst. 131. Beasts off his own Land on the high Road; so is the Statute of Marlbridge, c. 15. † Nulli liceat ex quacunque

<sup>\*</sup> Doing Damage.

<sup>†</sup> No one shall on any Account take Distresses out of his Fee, nor in the King's Highway or common Street, except the King, &c.

Causa districtiones facere extra Feodum fuum, nec in Regia via, aut Communi Strata, nifi Domino Regi, &c. For the high Road is privileged for the Convenience and Encouragement of Commerce; but though Chattels or Pledges on the Land only are to anfwer the Lord's Rent; yet if the Lord comes to distrain, and the Tenant feeing him drives the Cattle off the Land, the Lord may follow the Beafts and distrain out of his Fee, if he had once a \* View of his Cattle on his Land. But if the Beafts go off the Land of themselves, before the Lord seizes them, he cannot distrain them afterwards, as he might where the Tenant drives them off: For the Tenant by his own Wrong cannot prevent the Lord of his Right.

Dr. & Stud. 3dly. A Man cannot distrain in the 75. a. Night for Rent, because the Tenant hath not thereby Notice to make a

<sup>\*</sup> Altered by 8 Ann. c. 14. and Landlord may seize in five Days after Lessee has conveyed them off the Land; and by 11 Geo. 2. c. 19. the Time is enlarged to thirty Days.

Tender of his Rent, which possibly he might do to prevent the impounding of his Cattle. — But a Man may distrain in the Night Beasts \* Damage Feasant, because the Beasts might escape before Morning, and then he would have no Remedy for the Injury.

cessive but in Proportion to the Duty distrained for.—This is prohibited by the Statute of Marlbridge, c. 4. + Di- 2 Inst. 106, strictiones insuper sint rationabiles & 107- non nimium graves; & qui districtiones fecerint irrationabiles graviter amercientur.

Thus if the Lord distrain two or 2 Inst. 107? Ro. Abr. 674? three Oxen for 12 d. this is unreafonable; so if he distrain a Horse or an Ox for a small Sum where a Sheep or a Swine may be had, this is an excessive Distress.—But if there be no other Distress on the Land, then the taking of one entire Thing, though

\* Doing Damage.

<sup>†</sup> Moreover Diftresses should be reasonable, and not too heavy; and they who shall take unreasonable Diffresses shall be severely amerced.

of never so great Value, is not unreasonable.

4 Co. 8, 66.

No Distress for Homage, Fealty, or for the Expences of Knights in Parliament can be excessive, because these are Services of such absolute Necessity to the Publick, that Men cannot be under too great an Obligation to perform them.

Notice of his having taken a Distress, because the Tenant must know the Arrears that are due, and therefore at his Peril must take Care to pay them, so that it is his own Default that subjects the Land to the Lord's Distress; besides the Law has appointed a publick Pound for keeping the Distress, where the Tenant by resorting may have Notice.

But Qu. Whether Notice must not be given of dead Chattels, which must be kept in a private Pound.

Spelm. Gloss. The next Thing to be confidered 447. is where the Distress, which is but a Pledge, is to be kept, and that is in the the Pound. —— This is described by Spelman in these Words: \* Parcus est Stabulum, vel area Angustior Repagulis sirmiter conclusa, qua Nociva in frugibus prædiisq; pecora tanquam in carcere Coercentur. —— Parci autem usum a Continente traduxisse Saxones nostros binc intelligas, quod in Ripuariorum legibus jam olim utpote ante 800 vel 900 Annos reperitur, (Tit. 82. S. 2.) † Si quis peculium alienum in Messe adprebensum ad Parcum minare non per-Gall. mener. miserit, 15 Sol Culpabilis judicetur.

The Pound then being nothing more Co. Lit. 47. b. than a publick Prison for Goods and Chattels, is either || Overt or ‡ Covert;

<sup>\*</sup> A Pound is a Stall or narrow Place closely confined with Railing, in which Cattle destructive of the Corn and Farms are penned up as it were in a Prison.—But you may hence learn that our Saxons derived the Use of Pound from the Continent, in as much as it is found now about eight or nine Hundred Years since among the Laws of the Repuarii, Tit. 82. S. 2.

<sup>+</sup> If any one should prevent strange Cattle caught among the Corn from being drove to the Pound, he shall be adjudged guilty to the Value of sifteen Pence.

Open.
Close.

all living Chattels distrained, are regularly to be put in the Pound \* Overt, because the Owner at his Peril is to fustain them, and therefore they ought to be put in fuch an open Place as that he may have Refort to them for that Purpose.

2 Inft. 106.

At Common Law a Man might have impounded his Diffress in what Country he pleafed; but this was found very inconvenient to the Owner, who was thereby at a Loss where to find them, either to feed the Beasts or to replevy them: This Mischief was provided against by the Statute of Marlbridge, c. 4. + Nullus de cætero faciat ducere districtiones quas fecerit extra Comitatum in quo Captæ fuerint.

Yet upon this Statute it hath been held, that where the Tenancy is in one County and the Manor in another County, the Lord may drive the Di-

Open.

<sup>+</sup> No one for the future shall cause the Distresses which they have made, to be drove out of the County in which they were taken.

stress to the Manor Pound though it be out of the County where the Distress was taken; because the Tenant by attending the Manor Court is presumed to know every Thing transacted in the Manor; and therefore this Case is out of the Mischief provided against by this Law.

But now by the Statute of 1 & 2 Pb. 1 Car. 1. Sest. & M. c. 12. no Distress of Cattle is 2. c. 25. in to be driven out of the Hundred or

Barony where the same is taken, except it be a Pound \* Overt within the said Shire, not above three Miles from the Place where the same is taken; nor shall a Distress be impounded in several Places whereby the Owner may be constrained to sue several Replevins, on Pain to forfeit to the Party aggrieved five Pounds and treble Damages.

Dead Chattels, as Houshold Goods, Co. Lit. 47. b. &c. which may receive Damages by Ro. Abr. 673. the Weather, must be put into a Pound of Covert, otherwise the Distrainer is answerable for them if they be damaged

<sup>\*</sup> Open.

<sup>+</sup> Close.

or stolen away, and this Pound + Covert must be within three Miles in the same County.

trucker the filter Court is

But Beafts (as is faid) ought to be put in a publick Pound; for if they be placed in a private Pound the Distrainer must keep them at his Peril with Provision, for which he shall have no Satisfaction; and if they die for Want of Sustenance the Distrainer shall anfwer for them. - But he cannot in any Case make any Use or Advantage of the Thing distrained, whether it lies in a Pound \* Overt or + Covert, either by working or milking the Beafts, though it were for its Ease and Benefit; because the Distrainer has only the Custody of the Thing as a Pledge, and therefore is not to make Use of it, but the Owner may make Profit of it at his Pleasure.

Ro. Abr. 673. The Distrainer cannot tie or bind a Beast in the Pound though it be to prevent its Escape, for the Beasts in

<sup>\*</sup> Open.

<sup>†</sup> Close,

Pound are in Custody of the Law, which intends the Prefervation of the Pledge, and therefore the Distrainer at his Peril must do no Act that tends to the Hurt or Destruction of them. a Distress be taken without Cause, a Stranger cannot rescue them from being driven to Pound; but the Owner may make Rescue before they are impounded. - But after the Beafts are impounded, the Owner himself cannot rescue them, unless he find the Pound unlocked, for he cannot break it open. — The Reason is, that the naked Possession is a Title against any Person but the Owner; but the Owner has a Title, and therefore may take the Beasts at any Time, but he cannot break the Pound the Law hath ordained.

In Sir John Strange's Reports, published fince the Author's Death, are the following Cases.

1. The Landlord must remove the Goods at five Days End, or is a Trespasser. Griffin v. Scott, Strange 717. Ld. Raym. 1424. See 11 Geo. 2. c. 19. §. 10.

E 3 2. Trespass

- 2. Trespass does not lie for taking an excessive Distress. See Lynne v. Moody, Strange 851.
- 3. Where two Parcels of Land are distinctly let, there cannot be a joint Distress for both Rents. See Rogers v. Birkmire, Strange 1040.
- 4. Impounding in another County does not make a Trespasser. Strange 1272. Gimbart v. Pelab.

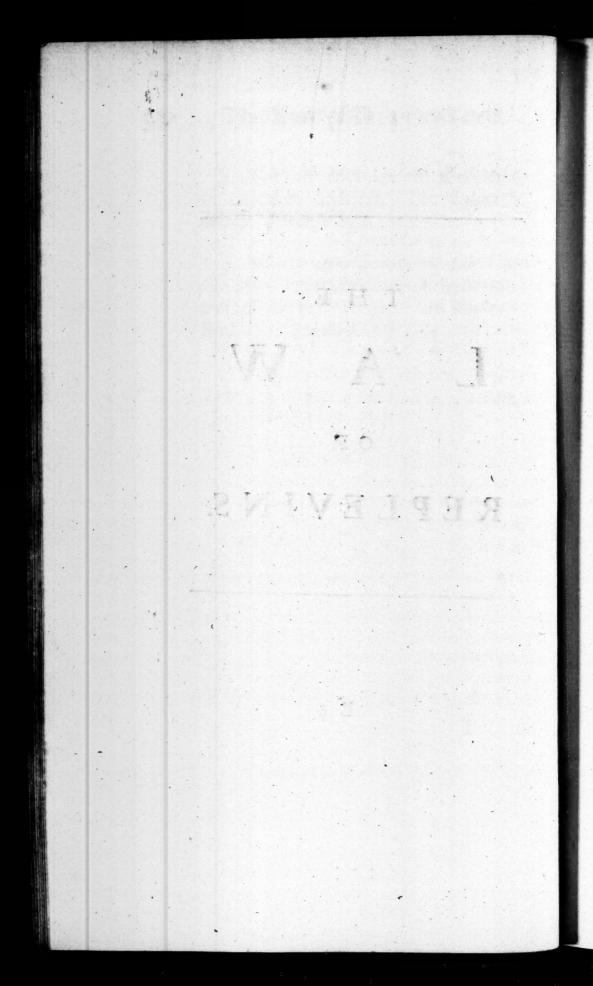
THE

# LAW

OF

REPLEVINS.

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# REPLEVIN.

## CHAP. II.

Chapter shewn in what Cases a Distress or Pledge may be taken, and how it is to be disposed of, the next Thing in order to be treated of is the Remedy given the Party to controvert the Legality of such Caption, in order to bring back the Pledge to the Proprietor in case that the Distress were unlawfully taken, and without just Cause; and this being a Writ of great Use, and every Day's Practice, deserves a very full Consideration.

Spel. Gloff.

Spelman in his Glossary describes it thus: \* Replegiare est rem apud alium Detentam Cautione Legitima interposita redimere—Et bæc Cautio est stipulatio in sorma Juris adhibita, de stando Juri et sistendo se soro; dictum autem Replegiare quasi revadiare, boc est Vadium vel pignus unum loco alterius suggerere & constituere.

Or, in other Words, a Replevin is a justicial Writ to the Sheriff complaining of an unjust Taking and Detention of Goods or Chattels, commanding the Sheriff to deliver back the same to the Owner upon Security given to make out the Injustice of such Taking, or else to return the Goods and Chattels.

<sup>\*</sup> To replevy is to redeem a Thing detained by another by the Interposition of a lawful Provision.——And this Provision is a Stipulation exhibited in a formal Right, to stand to that Right, and to be present in Court; but to replevy is said as it were to regage, that is to alledge or assign a Gage or Pledge at another Place.

Under this Head is to be confidered;

I. How the Replevin stood at Common Law, and the Alterations that have been made therein by Statutes.

II. Of the Duty of the Sheriff in the Execution of the Replevin; and herein of the Pledges.

III. Of the Process to make the Defendant appear.

IV. Of the Process where the Goods are eloigned; and herein of the Writ of Withernam.

V. Of the Process and Proceeding where the Defendant claims Property.

VI. Of the Process, as well for the Plaintiff as Defendant, in removing the Replevin from the inferior Courts.

VII. Of the Replevin itself; and herein are to be considered,

1. For whom and in what Cases it lies.

2. The

- 2. The Declaration in Replevin.
- 3. The feveral Pleas in this Action.
- 4. The Judgment in this Action, whether for the Plaintiff or Defendant; and herein of the Writ \* de Retorno babendo, and the Writ of second Deliverance.

# VIII. Of the Writ of Recaption.

2 Inft. 140. Reg. 81. a. I. To confider how the Replevin stood at Common Law; and here it is first to be observed that the Replevin was at Common Law a justicial Writ, that is, gave the Sheriff a justicial Power to determine the Point complained of in the Country, whereas other Writs gave him only a ministerial Power. This justicial Power is taken from these Words in the Writ: † Et eum juste deduci facias — by which the Sheriff is made Judge, whether the Taking be just or not; and this was

<sup>\*</sup> Of having the Return.

<sup>†</sup> And shall cause it to be carried on justly.
highly

highly reasonable, that this Remedy might be speedy, lest the Party should want his Beafts for carrying on of his Husbandry; and therefore not to have formed this Writ Justicial would have been not only detrimental to private Persons, but to the Damage of the Commonwealth. Hence it is called \* Festinum Remedium, Besides, it would have been of great Trouble and Expence to private Persons to have taken the Determination of these Sort of Complaints, which must have happened every Day out of the Neighbourhood. And yet the Manor Court was not trusted with this Power in any Cause between Lord and Tenant, because the Lord was not to be Judge in his own Caufe.

are two Things complained of in this Writ, viz. The Taking and Detention of the Pledges, as the Words of the Writ express it — † Quæ cepit & injuste detinet — But what is principally

<sup>\*</sup> A fpeedy Remedy.

<sup>+</sup> Which he took and unjustly detains.

Dr. & Stud. 112. 2 Inft. 107. 5 Co. 76. a. Pilkington's Cafe.

controverted in the Replevin, is whether the Taking be just or not. For there are but two Cafes wherein a Distress justly taken, whether for Rent or \* Damage Feafant, can be unlaw-8 Co. 146. b. fully detained. The first is where the Cro. Eliz. 813. Arrears of Rent, or Amends for the Damage is tendered to the Party difraining; and this Tender must be made before the Beafts are impounded; for when the Beafts are in the Custody of the Law, the Person distraining cannot be faid unlawfully to detain what is in the Custody and Care of the Law.

> And hence it is, that if a Tender be made after impounding, and the Beafts die in Pound, the Owner shall bear the Loss, because such Tender comes too late to fix any Fault or Injustice on the Person distraining. But if the Tender had been before the impounding, it feems the Distrainer is answerable, because the impounding is unlawful.

Doing Damage.

But here it is to be observed, that 5 Co. 76. a. the Tender of Amends must be pleaded Cro. El. 813. to the Lord himself, and not to the Brownl. 173. Bailiff, who makes Conusance of the Cause of the Caption and Detention in the Right of the Lord, and that Right is not barred by a Tender to any other than the Lord himself. But if a Tender be pleaded to the Lord, and they give in Evidence a Tender to the Lord's Bailiff, where the Lord was present, that won't maintain the Plea, because the derivative Power of the Bailiff ceases where the Lord is present, and they ought to prove the Tender to that proper Person to whom the Amends belong, and who was ready to receive it. But if they plead a Tender to the Lord, and prove a Distress taken by a Bailiff, the Lord not being prefent, and prove the Bailiff to be the usual Receiver of the Lord; Qu. If that will not be a Proof of fufficient Tender of Amends to the Lord himfelf?

The fecond Case where the Detainer 2 Inst. 107, is unlawful, is where the Avowant 341. hath Return irreplevisable, and the Owner

Owner of the Beafts tender all that appears to be due on the Judgment in the Avowry, the Detainer of the Avowant is unlawful, and the Owner may have his Action of Detinue for the Detainer after the Tender made: For though by the Judgment the Return is made irreplevisable, yet that is no final Condemnation of the Beafts or Goods distrained, for they are still to be confidered as Pledges in the Hands of the Avowant, and therefore in their own Nature liable to a Redemption upon Payment or Satisfaction of that Rent or Damages for which they were originally taken. - My Lord Coke affigns another Remedy for the Owner to recover his Beafts, and that is upon Satisfaction made in Court to have a Writ for their Delivery.

Qu. The Form of this Writ.

The Detention then being complained of in this Writ, it may not be improper to look into the antient Method of trying such unlawful Detention, and what Remedy the Owner of the Beast has for it at this Day. The antient Method of trying the Legality gality of the Detention was very inconvenient, for the Plaintiff in Replevin was to have his Suitors ready to prove instanter that he offered a Pledge under that Notion as a Pledge sufficient, and the Lord was then put to his Law-Wager, that the Pledge of fered was not sufficient to answer the Debt; fo that it was totally thrown upon the Lord's Conscience to determine of the Sufficiency of the Pledges; and this Method of Trial was antiently practifed and allowed, because originally the Lord might have feized the Land for Non-performance of the Services, and therefore when the Rigour of that Law was mitigated by turning the Forfeiture into a Distress, it could not be thought any unreasonable Favour of Indulgence to the Lord to make him Judge of the Sufficiency of the Pledge which was to be put into his Hands while the Suit depended, because the Lord in all Events ought to be safe.

This Account of trying the Legality of the Detention is given by Bracton in the following Words.

Bract. 156. Fleta 94. \* Si autem defenderit detentionem injustam, & querens sectam babeat statim ad manum quæ examinata in omnibus concors suit, & quod omnia sacta suerint sub eorum præsentia, tunc vadiabit desendens legem se duodecima manu, in qua si desecerit incidet in manum Vicecomitis, & restituet querenti damna sua quæ babuit per illam detentionem; si autem legem secerit Dominus, tunc quietus recedet, & querens in misericordia, sed nulla damna recuperabit, & returnabit Domino averia capta. — The Lord recovered no Damages where he prevailed on the Law-Wager, because the Lord had no Damage

where

<sup>\*</sup> But if he should defend the unjust Detention, and the Plaintiff should have a Suit immediately at Hand, which being examined, agreed in all Respects, and that all the Facts were in their Presence, then the Desendant should wage his Law by twelve Men, in which if he failed, it fell into the Hands of the Sheriff, and he should restore to the Plaintiff his Damages which he had by the Detention; but if the Lord prevailed in the Law-Wager, then he should depart quiet, and the Plaintiff in Mercy; but should recover no Damages, and should return to the Lord the Beasts taken.

where the Tender proved insufficient. But if the Lord prevailed not on the Law-Wager, the Plaintiff in Replevin had his Damages, because he really was injured by the Lord's Refusal, in losing the Use of his Beasts or Goods which he had a Right to upon the sufficient Tender.

But the Legality of the Detention Dr. & Stud. depending entirely on the Sufficiency of Cro. Eliz. 813. the Tender, a more equal and better N. B. 69. b. Method of Trial was found out by the Conscience of Twelve difinterested Men, no Way concerned in the Event of the Trial. And the Point comes in Iffue in the following Case; where the Lord impounds the Beafts notwithstanding the sufficient Tender of the Tenant, the Tenant hath no Way to recover his Cattle but by his Writ of Replevin; for if he takes them out of the Pound himself, he is liable to an Action for breaking the Pound: This puts the Lord to his Avowry, wherein he must shew the Cause of his Taking and Detention; to which the Plaintiff in Replevin replies, That after the Taking, and before the Impounding, he made a sufficient Tender, and thereupon

upon it shall be tried by a Jury whether the Tender was sufficient, and if it be found so, the Plaintiff in Replevin shall have Damages for such unlawful Detention.

But though by the Common Law this Writ was made justicial for the Ease of the Subject, and the more speedy Administration of Justice, yet the Subject (both Lord and Tenant) was exposed to many Difficulties and Inconveniencies in the Progress of the Suit, which were afterwards removed by several Statutes. For,

<sup>2</sup> Inft. 133.

5 Mod. 253. was only by Writ, and this Application must be to the Chancery, which was too tedious for the distant Parts of the Kingdom.

Stat. Marlb. c. 21. To make this Remedy therefore more, expeditious, 'tis provided by the Statute of Marlbridge, c. 21. \* Quod si Averia

alicujus

<sup>\*</sup> That if the Beasts of any Person are taken and unjustly detained, the Sheriff after Complaint made to him may deliver them without the Impediment or Contradiction of him who had taken the said Beasts.

alicujus capiantur & injuste detineantur, Vicecomes post querimoniam sibi factam ea 2 Inst. 139. sine Impedimento, vel contradictione ejus qui dicta averia ceperit, deliberare possit. By Force of this Statute the Sheriff may hold Plea in Replevin by Plaint of any Value, as he might at Common Law on a Writ of Replevin, the Writ of Replevin being a Justicies or Commission for that Purpose.

And to take away all the Delays F. N. B. 69. that attended the Replevin by Writ, Co. Lit. 145. the Sheriff by this Act may upon Complaint made command his Bailiff either by Word or Precept to replevy the Plaintiff's Beasts, for possibly the Sheriff cannot write (which was frequently the Case in those Days), or has not the Materials of writing with him, and this the Sheriff may do out of his Bro. tit. Rel. County Court: For this Act being pl. 46. made for the more speedy Administration of Justice, hath received the most favourable Construction. For it would be very inconvenient that the Owner of the Beasts, for whose Benefit the Act was made, should stay till the next County Court, which is held from Month to Month; but then the Sheriff must

must enter the Plaint at the next Court, that it may appear on the Rolls of the Court.

2dly. Another Mischief at Common Law was, that the Replevin being justicial, and determinable in the County Court, if the Plaintiff in Replevin pleaded to the Lord's Avowry that the Tenancy was \* Hors de son Fee, the inferior Court had no farther Conufance of the Action, because this Plea brought the Freehold in question, which the County Court 'not being a Court of Record had no Power to try, and therefore could not proceed; by which Means the Lord was left without Remedy to recover the Beafts as his Pledges, because the Court could not determine the Point on which the Return was to be made; this was remedied by W. 2. c. 2. which gave the Lord a Pone to remove the Cause into the King's Courts, where that Plea might be tried, and the Lord be established in the Possession of his Services,

<sup>\*</sup> Out of his Fee.

and still have the Pledges \* de Retorno babendo retained for him.

A third Mischief at Common Law was, that when the Avowant had Judgment for a Return of the Beafts, he had frequently no Benefit by his Suit, because it frequently happened that, pending the Suit, the Tenant had fold the Cattle delivered to him on the Replevin, and became infolvent. This Mischief arose from this, that the Sheriff could only take from the Plaintiff + Plegii de prosequendo in this as in other Actions, which Pledges were only to answer the Amerciament to the King 1 pro falfo Clamore, and looked no further: And even these being very small did soon degenerate into Form. To remedy this Inconvenience the faid Statute of W. 2. c. 2. hath directed the 2 Inft. 338, Sheriff, | non solummedo recipere Pleg. 340.

<sup>\*</sup> Of having the Return.

<sup>†</sup> Pledges of profecuting. † For his false Claim.

Not only to take Pledges of profecuting from the Complainants, but also of returning the Beasts if a Return of them should be adjudged; and if any Body should otherwise take Pledges, he himself should answer the Value of the Beasts.

de prosequendo de Conquerentibus, sed etiam de Averiis retornandis, si adjudit cetur retornandi; & si quis alio modo Plegios ceperit respondeat ipse de pretio Averior'.—But the Method of proceeding in this Case will be fully treated of under the Writ \* de Retorno habendo.

2 Inst. 338, 340. the Plaintiff had nonsuited himself, and the Avowant had Judgment never so often on such Nonsuit, yet he could not have a Return irreplevisable, but the Tenant might replevy the same Distress + in infinitum. This also is

Stat. West. 2. remedied by the same Statute of W. 2.

c. 2. by which it is provided, || Quod quam cito adjudicatum fuerit retornum

+ Without End.

<sup>\*</sup> Of having the Return.

I That as foon as the Return of the Beafts should be adjudged to him who made the Distress, the Sheriff should be commanded by a judicial Writ, that he return the Beasts to him who made the Distress, in which Writ is to be inserted, that the Sheriff could not deliver them without a Writ, in which let Mention be made of the Judgment given by the Justices, which could not be done but by a Writ from the Justices Rolls before whom the Plaint was carried on.

averior. distringenti, per breve de Judicio mandetur Vicecomiti quod retornum babere faciat distringenti de averiis, in quo brevi inseratur, quod Vicecomes ea non deliberet fine brevi, in quo fiat mentio de Judicio per Justic' reddit', quod fieri non poterit nifi per breve quod exeat de Rotulis Justic', coram quibus deduota fuerit Loquela; and purfuant to this Law the Writ de Retorno babendo concludes thus after a Recital Regr. Jud. 4. of the Judgment for the Avowant, a. \* Ideo tibi præcipimus quod præd' (the Avowant) averia præd' sine delatione retornari facias, & ea ad Querimoniam ipfius (the Plaintiff in Replevin) non deliberes sine Brevi nostro, quod de præfat. Judicio expressam faciat mentionem.

This Writ which must recite the former Judgment is the Writ of second

<sup>\*</sup> Therefore we command you, that the aforesaid (the Avowant) the Beasts aforesaid without Delay you return, and that you do not deliver them upon the Complaint of (the Plaintiff in Replevin) without our Writ, which should expressly mention the aforesaid Judgment.

Deliverance, which will be treated of in its proper Place. — Only here it may be necessary to observe, that if the Avowant hath Judgment in the second Deliverance, he shall have Return irreplevisable of the Beasts, but subject still to Redemption by the Tenant on Payment of the Rent, because they are still in the Nature of a Gage or Pledge. The several other Alterations that have been made in the Replevin will be taken Notice of under the subsequent Heads.

II. Of the Duty of the Sheriff in the Execution of the Replevin; and herein of the Pledges.

Dalt. Sher. 277. Cro. Car. 446. Cro. Jac. 414. 3 Mod. 57, 58. Dorrington v. Edwin. Comb. 1. 2 Show. 420. Skin. 244. Dalt. Sher. 439, 440.

Whether the Replevin be by Plaint or Writ, the Sheriff, before he grants the one or executes the other, ought to take from the Plaintiff Pledges \* de prof. and Pledges + de Retorno babendo; the first, as has been said, was at Common Law to answer the Amerciaments to the King | pro falso Clamore, in Case

<sup>\*</sup> Of profecuting.

<sup>†</sup> Of having a Return.

<sup>|</sup> For his false Claim.

the Plaintiff did not prevail in the Suit. The other Pledges were introduced by W. 2. 6. 2. for the Security of the Avowant in Case he should have Judgment for Return of the Beasts; And by this Act these Pledges are answerable to the Avowant if the Plaintiff hath disposed of the Beasts pending the Suit; and if the Pledges are insufficient, the Sheriff is made answerable by that Statute for their Insufficiency.

And it seems the Pledges \* pro Re. Dalt. Sher. torno habendo may be by Bond even of 440. Offic. Brev, the Plaintiff in Replevin himself. The 222. Condition of which is not only that the Plaintiff shall prosecute the Suit in Replevin, but also that he will make Return of the Beasts if Return thereof be adjudged by Law, and also to save harmless and indemnify the Sheriff for Delivery of the said Beasts: For the Sheriff being answerable for the Sussiciency of the Pledges, may take the Security as he pleases, since it is at his own Peril.

For having a Return.

Cro. Car.446.
I Jones 378.
Dalt. Sher.
434.

These Pledges are in the Nature of Sureties pro Retorno babendo, and therefore Money or any other. Cattle being a Pawn is not a Pledge within this Statute; for the Process, as shall be hereafter shewn, is by Scire Facias, which is a Process to bring the Pledge or Surety into Court to shew Cause. and therefore Cattle cannot be a proper Pledge: For this Reason a Sheriff has been adjudged to be liable to an Action of the Cafe for taking Money as a Pledge de Retorno babendo; because the Money was not fuch a Pledge as the Statute directs. And it feems there must not necessarily be more Pledges than one, if that be fufficient; though the Words of the Act are Pledges in the plural Number: Because if one Pledge be sufficient, the Defendant hath no Loss, and therefore the Intention of the Statute is answered which provides for the Defendant's Safety.

2 Inft. 139, 140. F. N. B. 68. The Sheriff having thus taken Pledges from the Plaintiff in Replevin, he ought forthwith to make Deliverance of the Goods or Cattle distrained;

but

but if the Distress was taken within a Liberty and impounded there, the Sheriff ought first to issue his Warrant to the Bailiff of the Liberty, having Return of Writs to make Deliverance. And if the Bailiff makes no Answer, or as the Statute of Marlbridge says, \* Ea deliberare noluerit, tunc Vicecomes pro defectu ipsorum Ballivorum ea faciat deliberari. — This Act as to this Part of it was made to enlarge the Power of the Sheriff by Impowering him to enter into the Liberty to make Delivery where the Bailiff was negligent. Whereas at Common Law the Sheriff could not enter into the Liberty without a Non omittas, which was too dilatory.

And by this Act, if a Distress was 2 Inst. 133, taken out of a Liberty and im-140. pounded within it, the Sheriff might enter the Liberty without any previous Warrant to the Bailiff, because the Caption, which is one of the Points

<sup>\*</sup> Will not deliver them, then the Sheriff for the Default of his Bailiffs shall cause them to be delivered.

complained of in the Replevin, was in the County, and out of the Liberty, and therefore the Right to make a Deliverance, ought to be in that Officer within whose District or Jurisdiction the Cause of Complaint first arose; and all this is Law, whether the Replevin be by Plaint or by Writ.

If the Diftress be drawn into a House, Castle, or other strong Hold, the Sheriff or his Bailiff, after Demand made for the Deliverance of the Distress, may break open the House or Castle to replevy them. This seems to be the Common Law, for though a Man's House is privileged by Common. Law for himself, his Family, and his own Goods, so that the Sheriff cannot break it open to attach any of them in a Civil Action at the Suit of a private Person; yet a Man's House could not privilege or protect the Goods of another Person unjustly taken, so as to prevent the Officer to make Replevin, because the Privilege and Security of a Man's House could protect but his own Goods .- This Practice however, of driving Diftreffes into ftrong Holds, was fo frequent in the Barons Wars, and

and the poorer Sort suffered so much from the Men of Power, that the Statute of West. 1. c. 17. expresly gives 2 Inft. 193, this Power to the Sheriff, or his Offi- 194. cer, to break the House, to make Delivery of the Cattle, whether the Replevin be by Plaint or by Writ. But this, as is said, must be after Demand made, and Notice given to the Lord to fuffer them to be replevied. And to deter the Person distraining Dalt. Sher. from refusing or neglecting to deliver 438, 439. the Distress, the Statute further directs, that the Caftle, or strong Hold, shall be razed and thrown down; but this must be on a Suit in Behalf of the King, wherein all Parties concerned in Interest must first be heard; and by this Act, if the Bailiff of a Liberty having Return of Writs, shall not make Deliverance for the Reason aforesaid, the Sheriff may proceed without Delay, or any new Authority, to make Replevin in Manner afore-mentioned, though in other Actions, even in Executions, at the Suit of private Persons, he cannot enter a Liberty without a Non omittas.

Dalt. Sher. 438, 439.

If the Replevin be executed, and the Deliverance made, where it is by Plaint, the Bailiff at the Time he makes Deliverance ought also to attach the Defendant by his Goods depending in the County Court, to make him appear at the next Court Day; for in this Action the Attachment is the first Process, because the Replevin complains of a tortious Taking, which is in Nature of a Trespass.

F. N. B. 69. M. 70. Dalt. Sher.

Where the Replevin is by Writ, and the Sheriff executes it before the Alias or Pluries comes to his Hands, the Sheriff may hold Plea of it in his County Court; but either Party may remove it by Pone or Recordare into the Courts above, the Plaintiff without Cause, and the Desendant upon Cause shewn.

This Writ of Pone, if it be taken out by the Plaintiff in Replevin, hath a Clause in it to summon the Defendant to appear in the Court above at the Return of the Writ,

Writ, \* Quod tunc sit ibidem præsato A. (the Plaintiss) inde responsurus; and so + vice versa. If the Replevin be removed by the Desendant, then the Pone commands the Sheriss, || Quod dicat præsato A. (the Plaintiss) quod sit ibi Loquelam suam versus prædictum B. (the Desendant) inde prosecuturus, si voluerit, &c. and by this Means both Parties have Days in the Court above.

If the Sheriff doth nothing upon F. N. B. 68. the first Writ, the Plaintiff may have an Alias, and after a Pluries Replevin; in the Pluries is always inserted this Clause, ‡ vel causam nobis certifices, quare mandatum nostrum alias tibi inde directum exequi noluisti vel non potuisti, and the same may be inserted in the Alias, if the Plaintiff pleases, and then

<sup>\*</sup> That he be then there to answer the aforefaid A. (the Plaintiff) hereos.

<sup>†</sup> The Course being changed.

<sup>||</sup> To tell the aforesaid A. (the Plaintiff) to be there to prosecute his Plaint thereof against the aforesaid B. (the Desendant) if he shall think proper.

<sup>‡</sup> Either certify your Reason to us why you would not or could not execute our Commands heretofore to you hereupon directed.

both the Alias and Pluries are return-Ro. Abr. 581. able in the King's Bench or Common Pleas; and the Pluries always determines the Power of the Sheriff to hold Plea of the Replevin in the County; and so doth the Alias, where the faid Clause of \* vel causam nobis certifices, &c. is inserted. - The Reason is, because this Clause gives either Party a Right to call upon the Sheriff, in the Courts above, to give an Account of the Execution of the Writ; and this on the Pretence or Supposition that the Sheriff hath not legally executed the Writ; the Sheriff thus called upon, cannot give the Court an Account how he hath executed the Writ, but by his Return on the Writ itself, and that cannot appear judicially to the Court, till the Writ and the Return be filed, and the Sheriff having thus parted with the Writ, he has no Authority to proceed farther in the Court below.

> By this Means the Plaintiff in Replevin may controvert the Sheriff's Return, and shall recover Damages

<sup>\*</sup> Either the Cause certify to us.

against him, if it be found to be false, or not duly made. - This is allowed the Plaintiff not only for his Damages, but also to intitle the King to a Fine against the Sheriff for his Contempt, and is the most expeditious way to oblige the Sheriff to make the Deliverance fairly, that the Plaintiff may not want his Beafts to carry on his Hufbandry .- But if the Sheriff injures the Defendant in the Execution of the Replevin by taking some of his Cattle, the Defendant has his Action of Trefpass against him to punish him, as in all other Cases of Trespass; and here we may observe one Thing peculiar to this Writ of Replevin, that the Defen- Ro. Abr. 581. dant on the Return of the Alias and Gawen v. Pluries has no Day in Court, nor is he as much as fummoned to appear by the Writ in the Court above; whereas in all other Actions, the Defendant by the very Original is put to his Pledges for his Appearance.—But the Reason of the Difference is this, in other Originals the Defendant is but summoned to answer the Plaintiff's Demands, and the Plaintiff by such Writ gets nothing from the Defendant till the Event of the Suit, and therefore the Defendant G 2 must

must have a Day in Court by the Ori-

ginal. - But in Replevin the Plaintiff hath his Beasts restored to him on the Execution of his Writ, and the Defendant shall never have Return unless in his Avowry he can justify the Caption, so that from hence it appears the Defendant need not be summoned in this Writ, because it is plainly for his Interest to do so, because otherwife he can never have the Return of the Cattle; and thus the Defendant Ro. Abr. 581. becomes Plaintiff or Actor. - And hence it follows that the Parties in Replevin may appear and plead at any other Term than that in which the Replevin is returned, because having no Day in Court on the Return, as is before observed, there can be no Discontinuance of the Suit, though the Plaintiff should not declare in the same Term. - If the Plaintiff should not declare in Replevin, the Defendant, though he hath no Day in Court, may however come in, and oblige the Plaintiff by Rule of Court to declare, because otherwise the Defendant could never have the Judgment of the Court

for a Return of the Beafts.

Gawen v. Ludlow.

But if the Plaintiff should of himself Officin. Brev. declare without any Compulsion from Dyer 246. a. the Defendant, as he may do, the De-Rast. Entr., fendant is brought into Court by At-570. tachment, &c. to plead, and if the Plaintiff shall obtain Judgment by Default, what Remedy hath he for his Damages?

It is usual now for the Plaintiff to F.N.B.68. E. take out the Replevin, Alias and Pluries, at the same Time, and if he has a Mind to take the Cause at once out of the Sheriff's Hands, he may deliver the Alias or Pluries as he thinks fit to the Sheriff, without ever shewing him the original Writ.-By this the Plaintiff, as is already observed, has a Right to call for the Sheriff's Return, and the Sheriff ought himself to appear in the Court above, to purge his Contempt, for disobeying or not executing the original Writ, which the Law prefumes was delivered to him, and then the Sheriff may excuse himself, by making an honest Return on the Alias Raft. Ent. or Pluries, \* & quod nullum aliud 578. a.

<sup>\*</sup> And that no other Writ, &c.

Breve, &c. came to his Hands; and thus the Plaintiff, if he pleases, may at once oust the Sheriff of his Juris-diction, without the Trouble of removing the Plea out of the Sheriff's Court by Pone.

III. We come now to the Process in Replevin to make the Defendant appear.

Reg. 81.

And here it is to be known, that the Replevin is vicontiel, and is a Commission to give the Sheriff Authority to gage Deliverance of the Beafts, and therefore there is no Day given to the Defendant by this Writ; but on this Commission the Sheriff makes out a Precept to deliver the Beafts, and also an Attachment to the Defendant to appear 'at the next Court Day. - So if it be by Plaint, the Precept is made to the Bailiff to deliver the Beafts, and to attach the Defendant; and the Reafon why Attachment is the first Process, is that Replevin complaining of a tortious Taking, is in Nature of a Trespass, and there an Attachment \* per

<sup>\*</sup> By Pledges.

Plegios is the first Process, lest the Defendant should escape.

But if the Sheriff do not execute the Replevin, then an Alias goes out, in which there may be a \* vel Caufam nobis fignifices, and the Reason is, that the Plaintiff being deprived of the Use of his Beafts which he is obliged to sustain in the Pound, the Law allows that he should in the Alias put in the third Process, because the Officer as a Defaulter is not answerable for not executing mesne Process till after two Faults; but for the above Reason, because the Beasts may be eloigned, and the Withernam may iffue on the second Process, the + Causam nobis fignifices is put in the Alias; and this Alias is either returnable into the King's Bench or Common Pleas; in the Common Pleas, because it is a Civil Plea; and in the King's Bench, because it is in the Nature of a Trespass; and into Chancery, because he may have a Withernam thence upon an Elongata,

<sup>\*</sup> Either fignify to us the Caufe,

<sup>†</sup> Signify to us the Caufe.

fince there is another Original, viz. a Pluries, which is yet to be iffued out of that Court. But if the therein do

If there be not \* Causam nobis fignifices, it is only vicontiel, as the first Writ. In the Pluries they must put in the Clause, + vel Causam nobis fignifices, because there have been two Neglects already in the Process. When the Pluries iffues, it has been much disputed whether the Sheriffs vicontiel Power be determined; and it Fitz. Abr. tit. is faid by the Reporter, 2 H. 7. 5.

Replev. pl. 16. Salk. 410.

that fince the Writ is to replevy + vel Causam significes, the vicontiel Power Bro. tit. Jour. continues. - But if he does not replevy them, he is to shew Cause why he did not; and this the Reporter argues to be the Sense of the Writ, from

pl. 82.

the disjunctive Words in it.

2 H. 7.5. But I take it, that the vicontiel Power is determined by the Pluries; 1. Because the Sheriff has been twice guilty of neglecting his Duty, and

the all rounds and

<sup>\*</sup> Signify to us the Caufe.

<sup>+</sup> Either fignify to us the Caufe.

therefore is not to be trusted with judicial Power.

how he has obeyed the Writ, and Ro. Abr. 580, therefore the Court must have the Writ, to see whether he has done his Duty or not; and if the Court be intitled to the Writ, to see whether the Officer has done his Duty, he cannot proceed on the Writ,

By the Pluries there is no Day in 22 H. 6. 20, Court, either to the Plaintiff or De-Rast. Ent. 570, Process in Refendant, but to the Sheriff in order to plevin. fine him, for disobeying the first Writ.

—But the way to give the Parties Day on the Pluries Replevin is thus:

If the Plaintiff comes into Court, and \* obtulit se, at the Day on which the Sheriff is to shew Cause to that Court, why he did not execute the first vicontiel Process, there as it appears by the Entries in Rastel, he shall have an Attachment against the Defendant, to bring him in to answer, and this Writ gives them both a Day in Court.

<sup>\*</sup> Offers himfelf.

nor to be truffed with The Reason is that Replevin is in Nature of a Trespass, and on every Trespass the Attachment is the first Process; and therefore as well in the Sheriff's Court below, as in the Court above, the Plaintiff may have an Attachment in the first Process. and if that the Defendant does not appear, and \* nulla Bona returned, then on the Statute 25 E. 3. ch. 17. they may have a Capias and Process of Outlawry, But at Common Law there was only a Diffress infinite, because there was no Fine to the King on the Replevin, unless where the + Elongata or Claim of Property was returned by the Sheriff; for these being Contempts of the King's Process, there was a Fine at Common Law, and therefore a Capias in the common Process came in by the Statute,

2 H. 6. 2. Bro. tit. Record. pl. 2. But if the Defendant comes in at the Day the Sheriff has in Court, he cannot demand the Plaintiff, because

# Office burdit

<sup>\*</sup> No Goods.

<sup>†</sup> Eloignment.

the Plaintiff has given the Defendant no Day in Court, and if the Defendant hath no Day, he cannot demand the Plaintiff under the Peril of a Nonfuit. and therefore the Method is for the Defendant to have a special Writ to warn the Plaintiff to come into Court and profecute his Plaint, which is in Nature of a Venire, and if the Plaintiff does not come into Court at the Return of fuch Writ, then he shall be nonfuited, and the Pledges amerced, in the fame Manner as where there is a vitious Pone, that gives the Defendant no Day in Court, yet the Record being removed, the Court proceeds on the first Writ there is removed, and on fuch Writ if the Defendant appears, the Plaintiff was not demandable, because there was no Day given to the Defendant, but he had a special Writ to warn the Plaintiff to come in and profecute, and if the Plaintiff does not on fuch Writ appear, he is nonfuited.

III. Of the Process where the Goods are eloigned; and herein of the Writ of Withernam.

Withernam

2 Inft. 140, 141. Spelm. de verbis namium, vetitum namiWithernam is derived from the Saxon Word Everder, or other, and Naam, which fignifies Distress, as who should say another Distress, instead of the former that was eloigned. — Vetitum Namium, is unlawfully taken, because though the taking of the Beasts might be originally lawful, yet the detaining against the Replevin, is unlawful or forbidden.

The Withernam is Part of the \* Lex Talionis, which as it prevailed in the Cases of Maihem, where the Judgment of old was in this Kingdom, Eye for Eye, and Tooth for Tooth, so was it in the Case of taking and against detaining Pledges, Beast for Beast.

Withernam was twofold.

I. In the County below: And

II. In the Courts above.

<sup>\*</sup> Law of Retaliation.

1. In the County below; though Reg. 82; the Sheriff's Bailiff returned that the Beafts were eloigned, yet the Withernam did not immediately go, because the Defendant was not to lose his own Beafts on the Return of a Bailiff, against whom if the Return were false, he could have no Satisfaction. - And therefore in fuch Case, there was an Inquest of Office holden by the Sheriff to see whether the Beasts were found to be eloigned or not; and if the Beafts were found eloigned, then there isfued a Withernam, for the Eloignment found by the Jury, \* secundum Legem Talionis.

2. In the Court above the Withernam is awarded on the Elongata returned. For the King's Minister having returned, that the Beasts were eloigned, so that he could not do Execution, there is a proper Ground to award this Process.

<sup>\*</sup> According to the Law of Retaliation.

First, because the Sheriff is liable for a false Return, who is a Person sufficient to answer the Party.

Secondly, because the Sheriff's Return is supposed to be true till the contrary appears; and there is no Mischief to the Desendant in this Case, since on producing the Cattle which he has taken, he may have his Beasts again; and therefore it was proper such a Writ should go out \* secundum Legem Talionis, on the Sheriff's Return without any Inquest, rather than the Plaintiff should want his Cattle, and his Husbandry stand still in the mean Time.

F.N.B. 73. E. This Writ lieth where a Man takes the Goods or Cattle of another Man; and the Party sueth a Replevin by Writ, and an Alias and Phuries, and upon the Phuries the Sheriff doth + Re-

† And not upon Suggestion only that the Beasts are eloigned, (11 H. 8. 16. per Cotton) by Reason whereof he could not replevy them, &c. for this being an Award secundum Legem Talionis, could not be on a Surmise, unless the Eloignment was found on him by Inquest below, or returned upon him above, by the proper Officer.

<sup>\*</sup> According to the Law of Retaliation.

turn, that the Cattle or Goods, &c. are eloigned, &c. then this Writ of Withernam shall issue out of the Court where the Pluries is returned, returnable in the King's Bench or Common Pleas \*; and the Form of the Writ is such.— † Rex Vic. Linc. Salutem. Quum Pluries tibi Præcepimus, &c. quod juste,

And not out of the Chancery, (42 & 43 Eliz. inter Crindel and Pound, C. B.) but if Elongata be returned upon the Alias in Chancery, then the Withernam shall iffue out of the Chancery, (22 H. 6. 22. per Brown) for the Elongata being the Foundation of the Withernam, whereever the Elongata is returned, there the Withernam must be awarded; and fince the Alias, as it is faid, is returnable into Chancery, the Withernam must thence issue. But though it goes out from thence, it is returnable into one of the Benches, because it gives the Defendant Day thereon to proceed, for fince the Defendant's Goods are taken secundum Legem Talionis, he must have a Day given to dispute the Lawfulness of such taking.

<sup>†</sup> George the Second, &c. To the Sheriff of, &c. Greeting: Whereas we have often commanded you, &c. that justly, &c. to A. his Beasts which B. &c. or the Reason, &c. wherefore you have not or could not execute our Command hereupon often directed to you, and you shall fignify to us wherefore after the aforesaid B. the Beasts of the aforesaid A. had taken

juste, &c. A. averia sua quæ B. &c. vel Causam, &c. quare mandatum no-Arum Pluries tibi inde directum exequi noluisti vel non potuisti, ac tu nobis fignificaveris, quod postquam prædictus B. averia prædicti A. cepit in Comitatu tuo, ea fugavit de Comitatu prædicto in Comitatum B. per quod ea eidem A. Replegiare non potuisti; nos malitiæ ipsius B. obviare volentes in bac parte, tibi Præcipimus quod averia prædicti B. in Balliva tua inventa, sine dilatione Capias in Withernam, & ea detineas, donec eidem A. averia sua prædieta secundum Legem & consuetudinem Regni nostri Reglegiare possis, juxta tenorem Mandatorum nostrorum prædictorum prius tibi, &c.

in your County, did drive them out of the aforesaid County into the County of B. by Reafon whereof you could not replevy them to the
faid A. We being desirous to prevent the mischievous Design of the said B. in this Behalf, do
command you, that without Delay you take in
Withernam the Beasts of the aforesaid B. found
in your Bailiwick, and detain them until you
are able to replevy to the said A. his Beasts aforesaid, according to the Law and Custom of
our Realm, pursuant to the Tenor of our Commands aforesaid before to you, &c.

That

That the Defendant shall have a F.N.B. 73. F. Day in this Writ by Attachment, and in the Notes. not otherwise. See 7 H. 4. 27.
43 E. 3. 26. 35 H. 6. 47. viz. if the \* Elongata be returned on the Pluries Replegiari facias, then it has such Clause, † Et si querens fecerit, &c. tunc Pone Defendentem, &c. ad Respondendum tam Domino Regi de Contemptu, quam præsato Querenti de Captione & injusta Detentione Catallorum prædictorum. Dyer 189.

There is an Attachment put into this Writ, because it is not a vicontiel Writ, as the Replevin, but a judicial Writ founded on the Supposition of an original unlawful Taking, and likewise of continuing a Contempt, by not permitting the Sheriff to gage Deliverance.—But it seems there had been no such Clause in the Withernam, if it

<sup>\*</sup> Eloignment.

<sup>†</sup> And if the Plaintiff shall make, &c. then put the Defendant, &c. to answer as well the Lord the King for the Contempt, as the aforesaid Plaintiff for the Taking and unjust Detention of the aforesaid Cattle.

had been a Plaint in the County, (vide ibid. & 44 Aff. 15.) for the Sheriff cannot upon his Plaint punish the Eloignment, as a Contempt of the Authority of the King, fince it is only a Contempt of the Process of his own Court; and therefore it feems that if a Plaint be removed by Recordare, which gives the Parties Day in Court, it shall go without fuch special Attachment, to answer the Contempt of the Sheriff's Court below. But if the Replevin had been by Writ, and fuch Writ had been removed by Pone, and the Sheriff had returned an Eloignment, there it feems the Attachment for the Contempt had been in the Withernam, because there the Plaintiff had been attached for his Contempt to the King.

Note; This is a Writ \* de Bxecu-Reg. 83. a. Salk. 582. tione Judicii, and therefore recites the That the Wi-Award of the County Court as a thernam is only meine Judgment. - But there is no Attach-Process, for it ment for Contempt against the Defencannot be an Execution be-dant, because the Proceeding was not fore Judgby the King. - And note, this Writ ment.

<sup>\*</sup> Of Execution of the Judgment.

sheriff's sleeping upon such Judgment of Withernam in his own Court, for though it be not returnable into any of the King's Courts, yet the King's Writs are always to be obeyed, and an Attachment lies upon the Sheriff's Disobedience.

Note; The Sheriff's Capias in Wi-Dalt. Sher. thernam must be in Writing, and not 437. by Word only, because it is in Nature of a second Execution of the Award of the County Court, and therefore not like the Plaint in Replevin, which for the Suddenness of the Thing may be verbal only.

By the Statute of Marlbr. c. 3. the Dalt. Sher. Sheriff has Power of fining the Defen- 435. dant that refuses to deliver the Distress; and the Writ of Withernam ought to F. N. B. 73. rehearse the Cause which the Sheriff returneth, for which he cannot replevy, as to say,

\* Ac postquam prædictus B. Catalla vel Averia illa cepit, Catalla vel Averia illa aut Bovem vel Equum elongavit extra Ballivam tuam, ita quod nullam deliberationem inde eidem A. facere potuisti, sicut nobis significasti, &c. Nos tibi præcipimus quod Catalla vel Averia, &c. prædicti B. sine dilatione cap. in Withernam, & ea detineas donec eidem A. &c.

Reg. 82.

And there are very many Causes that the Sheriffs may return upon the Pluries, wherefore he cannot replevy them, whereof divers of them do appear in the Register, which a Man may see there.

<sup>\*</sup> And after the aforesaid B. had taken the Cattle or Beasts, he eloigned the Cattle or Beasts, or Ox or Horse out of your Bailiwick, so that you could not make any Delivery of them to the said A. as you have signified to us, &c. We command you that without Delay you take in Withernam the Cattle or Beasts, &c. of the aforesaid B. and them detain until to the said A. &c.

And if the Sheriff do return upon the Pluries Replevin, that he hath fent unto the Bailiff of the Liberty, who hath Return of Writs, &c. and that the Bailiff hath given Answer that he cannot execute the Writ, because he cannot have a view of the Cattle or Goods which were taken, then the Court in which fuch Return is made, shall award a Withernam directed unto the Sheriff, and the Sheriff shall thereupon make his Precept unto the Bailiff of the Liberty, and if the Bailiff of the Liberty doth not make a Return thereof unto the Sheriff, then the Sheriff shall return the whole Matter in Court, and thereupon the Court shall award a Writ of Withernam, and a Non omittas with the same, and the Form of the Writ shall be such,

\* Rex Vic. B. Salut. Cum plur. &c. usq; ibi, vel non potuisti, ac R. de C. H 3 Balli.

<sup>\*</sup> George the Second, &c. To the Sheriff of, &c. Greeting: Whereas often, &c. (until) or could not execute, &c. and R. of C. Bailiff of the Liberty of J. whom you caused to have the Return

Balli. Libertat. J. cui return. brev. nostr. babere fecisti, tibi responderit, quod Executionem Brevis illius facere non potuit, &c. sicut tu nobis significasti, per quod tibi præceperimus quod averia prædicti B. in Balliva tua sine dil'one caperes in Withernam, et ea detineres donec eidem A. averia sua, &c. inde direct. vel Causam nobis Significares, &c. vel tu non potuisti, ac tu nobis returnaveris, quod idem R. Balliv. Libertat. præd. cui return. &c. babere fecisti, nullum tibi inde dedit responstibi præcipimus quod non omittas propter Libertat. prædictam quam eam ingre-

Return of our Writs, hath given you Answer that he could not execute that Writ, &c. as you have made known to us: Wherefore we commanded you, that you should without Delay take in Withernam the Beasts of the aforesaid B. in your Bailiwick, and them detain until to the same A. his Beasts, &c. hereupon directed, or make known to us the Reason, &c. why you could not; and you returned to us, that the same R. Bailiff of the Liberty aforesaid, whom the Return, &c. you caused to have, gave you no Answer thereupon. We command you, that you do not omit by Reason of the aforesaid Liberty, but that you enter it, &c. that you take in Withernam until, &c. pursuant, Gr. before to you, &c. Witness, &c.

diaris,

diaris, &c. Capias in Withernam, donec, &c. Juxta, &c. prius tibi, &c. Teste, &c.

And if a Man's Cattle be distrained, 1 Stat. Marlb. and he fue a Replevin, by Plaint made West. 1. c. 17. unto the Sheriff, for which the Sheriff makes a Precept to the Bailiff to replevy them, and the Bailiff return at the next County Court, that he cannot replevy the Cattle, because they are eloigned, or that he cannot have View of the Cattle, then the Sheriff in the same County Court ought to make Enquiry if it be true, which is returned, and if it be so found by the Jury, then the Sheriff \* ex Officio + shall make a Precept unto his Bailiffs in the Nature of a Withernam, to take as many Cattle of the other Party's .-And if the Sheriff make fuch Precept, to take the other's Cattle in Withernam, and the Bailiff will not execute the Writ, then the Party may have a spe-

† But see the Register 82. where it is said, he is not bound to do it without a Writ.

<sup>\*</sup> By his Office.

cial Writ out of the Chancery, directed unto the Sheriff, commanding him to do Withernam, and to do Execution of the first Judgment, and the Writ shall be such,

\* Rex Vic. &c. Monstr. nobis A. quod cum B. & C. averia prædicti A. cepissent & injuste detinuissent, idemq; A. coram te prosecutus fuisset pro averiis prædictis sibi secundum Legem & Consuetud. Regni nostri replegiandis, ac licet per J. Ballivum tuum, quem ad Averia prædicta prædicto A. repleg. missti,

<sup>\*</sup> George the Second, &c. To the Sheriff of, Ec. A. hath shewn to us, that whereas B. and C. took and unjustly detained the Beasts of the aforesaid A. and the same A. before you prosecuted for the Beafts aforefaid to be replevied to him, according to the Law and Custom of our Realm; and altho' it was attefted by your Bailiff, whom you fent to replevy the Beafts aforefaid for the aforesaid A. and the Fact found by Inquisition (as usual) in your full County, that the same Bailiff could not have a View of the fame Beafts in order to replevy the fame to the aforesaid A. whereupon in your full County it was confidered, that the Beafts of the aforesaid B. and C. in your Bailiwick should be taken in Withernam and detained until to the same A. his Beafts

misisti, Testatum fuerit, & per Inquisitionem (prout moris est) in pleno Com. tuo factum compertum, quod idem Balliv. visum de eisdem averiis habere non potuit, ad eadem præfat. A. Replegiand. per quod in pleno Com. tuo Consideratum fuit, quod averia prædict. B. & C. in Balliva tua caperentur in Withernam, & detinerentur quousq; eidem A. averia sua prædicta secundum Legem & Consuetud. Regni nostri Repleg. possint; idem tamen A. Executionem Considerationis prædictæ nundum assecutus est, ad Damnum ipfius A. non modicum & Gravamen, & quia præfato A. Subvenire Volumus in bac parte, tibi præcipimus quod fi ita fit, averia prædictorum B. & C. cap. in Withernam, & ea

Beasts aforesaid, according to the Law and Custom of our Realm, should be replevied; yet the same A. hitherto hath not obtained Execution of the Consideration aforesaid, to the no small Damage and Grievance of the said A. and because we are willing to affish the aforesaid A. in this Behalf, we command you, that if it be so you take in Withernam the Beasts of the aforesaid B. and C. and them detain until you are able to replevy to the same A. his Beasts aforesaid, according to the Law and Custom of our Realm, and pursuant to the Consideration aforesaid, &c.

detineas,

detineas quousq; eidem A. averia sua prædicta Repleg. possis, secundum Legem & Consuetud. Regni nostri & Juxta Consideration. prædictam, &c.

And further by this it appears, that the Sheriff may award Withernam, on Replevin fued by Plaint, if it be found by Inquest in the County, that the Cattle are eloigned according to the Bailiss's Return, &c. But upon the Withernam awarded in the County, if the Bailiss do return that the other Party hath not any Thing, &c. he shall have an Alias and a Pluries, and so infinite; and hath no other Remedy there, because no Capias lies but in the King's Courts.

But upon a Withernam returned in the King's Bench or Common Pleas, if the Sheriff do return that the Party (a) hath not any Thing, &c. there a Capias shall be awarded against him, and Exigent and Process of Outlawry.

(a) See 28 E. 3. 57. and a \* ficut alias there granted.

<sup>\*</sup> As before.

In Replevin fued by Writ, if at the F.N.B. 74.D. Pluries returnable the Sheriff doth return, \* Quod averia Elongata funt, Now if the Defendant appear, the Plaintiff shall not have a Withernam, because the Defendant appears at the Day when the Sheriff returns the Pluries, which is a voluntary Appearance, fince there is no Day given him, therefore he has Time to purge his Contempt, by gaging Deliverance of the Cattle; but if he doth not gage Deliverance of the Cattle, it feems they may either award a Withernam, or commit him for his Contempt; and if the Defendant's Cattle be taken in Withernam, they shall not be delivered to the Plaintiff, but the Sheriff shall keep them + Quousque, &c. and the same appears by the Words of the Writ: (a) But

(a) See the like Diversity, 2 H. 4. 9. yet quære Rast. Ent. 702, 704. that the Clause of the Withernam, Whether for the Plaintiff or Desendant is, † Quod Vicecomes capiat in Withernam, &c. & ea præs. A. deliberet, detinenda quousque,

<sup>\*</sup> That the Beafts are eloigned.

<sup>†</sup> Until, &c.

That the Sheriff take in Withernam, &c. and deliver to the said A. to be detained until, &c.

But it is faid that it is the Usage in the King's Bench, that they shall be delivered unto the Plaintiff, by which it feems that the Form of the Writ of Withernam there is different from that in the Register.

2 H. 4. 9. pl. 3. Raft. 702, 704. Dyer 188.

This is a Point that has been feveral Times controverted, and some of the Clerks made the Distinction between Bro. tit. With. the Practice of the King's Bench and Common Pleas; but the true Distinction is between the original and judicial Co. Ent. 612. Writ of Withernam; by the former the Sheriff is to take \* & ea detineas donec eidem, &c. which obliges the Sheriff to detain the Beafts in his own Custody; but in the judicial Withernam the

> quousque, &c. So is the Entry in Bredon's Case, I Co. 75. and which was in the Common Pleas, fee 25 E. 3. 4. 7. but more fully in Fitz. Abr. tit. Gage Deliverance, pl. 8. where the Sheriff in his County levies Goods of the Plaintiff in Withernam, after a Return hath been awarded on a Nonfuit, if he doth not deliver them to the Defendant, he shall have an Action against the Sheriff.

<sup>\*</sup> And them keep until to the same, &c.

Words are, \* Capias in Withernam, & Salvo & Secure custodiri facias, donec, &c. which is to be interpreted, that he must deliver them to the Plaintiff upon good Security, for that is making them to be safely kept.

The Reason of the Difference is this, that on the vicontiel Writ below, where it was found that the Beafts were eloigned, the judicial Award of taking the Defendant's Beafts could be only quousque he gaged Deliverance, because every Execution in the Sheriff's Court was no more than the levying a Pain to make the Party perform the Sentence of that Court; for they could not execute the Sentence of that Court, by changing the Property, or delivering it over to the Suitor, but by levying Pains to make them perform it; and therefore when the Return of + Elongata is made into Chancery, the Withernam then goes out as a vicontiel Process, and is therefore conceived in

+ Eloignment.

<sup>\*</sup> Do you take in Withernam, and cause them to be safely and securely kept until, &c.

the fame Manner as it is below; and in the Writ \* de Executione facienda in Withernam, there is no Return into the King's Courts; but where the Elongata is returned into the King's Bench or Common Pleas, there the Withernam goes out as a judicial Process, and there the Courts who can alter the Property have made it + fecundum Legem Talionis, viz. that the Defendant's Goods shall be delivered to the Plaintiff to make use of it till his own are reftored; and it was faid to be the Practice of the King's Bench, because that was the Court where the Il Lex Talionis in Case of Murder and Maihem first fettled the Practice.

On a Recordare the Plaintiff de-Fitz. Abr. tit. clares, and the Defendant avows; the Gage-Deliver. pl. 8. Plaintiff prays the Defendant may gage Deliverance, and the Defendant pleads that Part of the Beafts were delivered, and the other dead through the Plaintiff's Default; to this the Plaintiff re-

<sup>\*</sup> Of caufing Execution to be done.

<sup>+</sup> According to the Law of Retaliation.

<sup>|</sup> Law of Retaliation.

plies, that he commenced a Replevin by Plaint, that the Sheriff made Deliverance, and took Security to have Return, or the Value, that he was nonfuit in Replevin, and on this the Plaintiff took from him 20 s. per Withernam, and of this he would have the Defendant gage Deliverance; and infifted that it ought to be delivered by the Defendant, because he had avowed the Taking, and that therefore the Defendant was to have an Action against the Sheriff, and in order to have Deliverance, the Plaintiff was forced to take Isfae, that the Sheriff delivered the 20 s. to the Defendant.

Note; the Writ of Withernam is Raft. Ent.

\* ad respondendum tam Domino Regi de 35 H. 6. 47.

Contemptu, quam Parti de Damno & 2 Leon. 85.

Injuria; for to eloign the Goods was to stop the Replevin, and hinder the Plaintiff from pursuing his just Right, for which he was fineable to the King.

<sup>\*</sup> To answer as well the Lord the King for the Contempt, as the Party for the Damage and Injury.

If on the Withernam the Sheriff returns that the Defendant hath no Goods, a Capias issues and Process of Outlawry; and this was at Common Law, both in the Writ of Withernam \* & de proprietate probanda, because on both these Writs a Contempt is supposed and appears against the Defendant by the Returns of the Sheriff, and therefore the Party is fineable for his Contempt, and wherever there was a Fine for the King, a Capias lay at Common Law, as it did for a Trespass + vi & armis, where there was a Fine for the King. But 25 E. 3. c. 17. gives the Capias in Replevin, on that Attachment iffuing to bring in the Defendant; but this Capias does not lie in the Sheriff's Court, for it is given as in Account, which was always in the King's Courts on the Sheriff's Return of | nulla Bona.

<sup>\*</sup> And of trying the Property.

<sup>†</sup> With Force and Arms.

<sup>|</sup> No Goods.

to the wind white the street

Where the \* Retorn. Habend. is awarded for the Defendant, Withernam, Capias, and Process of Outlawry lies against the Plaintiff, because there likewise is a Contempt against the King.

And here we must take Notice, 2 Inst. 106. that the Statute of Marlb. c. 4. which says, that + Nullus de cætero faciat ducere districtiones quas fecerit extra com. in qua Captæ fuerint, & si, &c. Puniatur per Redemption. veluti de re sacta contra Pacem, and gives a Fine to the King upon an Eloignment returned by the Sheriff in the King's Court, is but in Affirmance of the Common Law.

If the Sheriff return that the Diftress is eloigned, so that he cannot deliver them upon the Replevin, or upon

<sup>\*</sup> Have the Return.

<sup>†</sup> No one should for the future carry the Distresses which he had made out of the County in which they were taken, and if, &c. he should be punished by a Fine as for a Thing done against the Peace.

the \* Retorno Habendo the Withernam goes, for where it appears there cannot be a Delivery made of the fame, the Law commands an equivalent + fe-cundum Legem Talionis.

F.N.B. 74.E. Carth. 286. 4 Mod. 183.

week as Contemporation the In a Replevin at the Pluries returnable, if the Sheriff doth return | quod overia Elongata funt, &c. and the Defendant doth appear, and plead that he did not distrain them, now the Plaintiff shall not have Withernam; and so if the Defendant at the Pluries returned, appear and plead that the Cattle were dead in the Default of the Plaintiff, the Plaintiff shall not have Withernam, for if he did not take them, or if the Cattle be dead by the Default of the Plaintiff, then + fecundum Legem Talionis, he ought not to have the Defendant's Cattle, and therefore while this is in Issue, no Withernam ought to be awarded.

<sup>\*</sup> Returns being had.

<sup>+</sup> According to the Law of Retaliation.

<sup>|</sup> That the Beafts are eloigned.

Note, that if in Replevin Wither- F.N.B.74.E. nam is awarded, and afterwards the Note. Defendant avows the Taking as his proper Goods, or for a Heriot, or denies the Taking, the Plaintiff Chall gage Deliverance of the Withernam, for the Withernam ought not to have been awarded, but the Defendant shall not gage the Deliverance of the Goods taken, fince he claims them as his own; yet the Defendant might have come in pais and claimed the Property; but whenever he claims them it is sufficient to stop the Deliverance. 30 E. 3. 9. If Withernam be taken, and afterwards the Defendant comes into Court and makes Conusance as Bailiff to J. S. and prays Aid of him, who joins in Aid, the Defendant shall have Deliverance of the Beasts in Withernam, for it belongs to the Lord to make Deliverance of the first Beasts. and not the Bailiff, 7 H. 4. 28. per Horton, because the Bailiff took them only as a Servant, therefore his Cattle ought not to be taken as a Compenfation for the Mafter's not restoring the Distress.

I a And

F.N.B. 74. E. And the Defendant in some Cases shall have a Withernam against the Plaintiff, as if the Defendant has a Return awarded for him, and he fueth a Writ \* de Retorno Habendo, and the Sheriff return upon the Pluries, + quod averia Elongata sunt, &c. he shall have a Fieri Facias against the Pledges, &c. according to the Statute of Westm. 2. c. 2. and if they have nothing, then he shall have Withernam against the Plaintiff of the Plaintiff's Cattle, | quod vide, Tr. 7 R. 2. see 5 H. 5. 7. the Avowant may have a Withernam prefently, for it was at the Common Law, 7 Ric. Withernam 11. he cannot have it before a Scire Fac. returned against the Pledges, in an Attachment against the Party, and for a Default of a Distress, Process of Outlawry lies.

It has been doubted, whether on Westm. 2. c. 2. that gives Pledges ‡ de Retorno Habendo, it be necessary to sue

<sup>\*</sup> To have the Return.

<sup>†</sup> That the Beafts are eloigned.

<sup>|</sup> Which fee.

t Of having the Return.

a Scire Facias, and have a \* Nibil returned, before you can have a Capias in Withernam, in as much as you must shew it impossible to have the Cattle returned before you can by the + Lex Talionis come on the Goods of the Plaintiff. But it seems that the better Opinion is, that the Statute only gives him another Security and Remedy by Scire Facias against the Pledges, and does not take away nor alter the Remedy given by Common Law. 5 H. 5. 7. Fitz. Abr. tit. Process, pl. 115.

In Replevin, Withernam was award-11 H. 4. 10. ed against the Defendant, and after-Bro. Abr. tit. wards the Defendant claims Property, F.N.B. 74. A. and they are at Issue, the Plaintiff Note. gages Deliverance of the Withernam, and a Writ issues for him to make Deliverance accordingly; the Sheriff returns Elongata, on which Withernam is awarded against the Plaintiff, and upon Nil returned, a Capias issued; then the Issue is found for the Plaintiff, upon which he had Judgment; now

<sup>\*</sup> Nothing.

The Law of Retaliation.

upon the Return of the Pluries against the Plaintiff, the Defendant prays an Exigent against him, \* & babuit; and by Thirwit the Defendant shall recover Damages for the detaining of the Withernam in this Action; the Reason is, that as foon as the Defendant claimed Property, the Withernam Beafts were detained unjustly by the Plaintiff, and the subsequent Verdict, though found for the Plaintiff, did not make the Detainer, which was in itself unlawful, lawful + ex post facto; for the Plaintiff could not detain Beasts in Withernam, when the Defendant claimed the Thing replevied as his own Property, and not as a Distress; for the Withernam proceeds on the Supposition that the original Taking was a Distress, and if the first Beasts had been the Defendant's, they ought not to be removed out of his Possession, much less ought other Beasts have been taken in Withernam.

<sup>\*</sup> And had it.

<sup>+</sup> By an after Fact.

Deliverance granted, the Shorile one of Per Danby and Moyle, the Defen-See Dyer 41. dant shall recover Damages in Withernam on an \* Elongata returned, on a Writ + de Retorno Habendo alii. || Contra. If the Reason of the Doubt is, because if the # Retorno Habendo be entirely to right the Defendant, Damages must be recoverable in Case the Beafts be eloigned. The other Opinion is, that it is only a judicial Writ to cause the Beasts to be returned; but the better Opinion is, that he shall have Damages, because by the Eloignment he is deprived of the Benefit and Use of the Beafts, which he ought to have been immediately put in Possesfion of, in Pursuance of the Judgment.

If the Plaintiff be nonfuit, he may have a second Deliverance presently, and this shall be a Supersedeas to the ‡ Retorno Habendo; and if the Retorno Habendo be sued after the second

<sup>\*</sup> Eloignment.

<sup>†</sup> To have another Return.

On the other Hand.

<sup>‡</sup> Having the Return.

Deliverance granted, the Sheriff ought not to execute the second Deliverance: Now this prevents the Mischief of the Withernam against the Plaintiff.

F. N. B. 74. A. Note.

A. brings Replevin against B. and has Deliverance, and after is nonfuit, and a Return awarded to B. and upon this an \* Elongata being returned, B. has the Beasts of A. in Withernam .-In this Case, if the Plaint was first in the County, and removed in C. B. the fecond Deliverance must not be sued of the Beasts delivered in Withernam, but of the Beasts first taken, and the Defendant shall be put to gage Deliverance of the Withernam (+ quod nota), and yet the Plaintiff himself is possessed of the Beasts whereof he complains; and if he makes his Complaint, or Count of the Beasts delivered in Withernam, it is not good. - 25 E. 3. 90. pl. 38. 33 E. 3. Avowry 256. 13 E. 3. Replevin 37. Pluries 3. Dyer 59. accordingly per Cur. in second Deliverance; the Reason is before given,

<sup>\*</sup> Eloignment.

<sup>+</sup> Which observe.

for the fecond Deliverance is a judicial Writ appointed by the Statute, and therefore must in all Points pursue the Record out of which it issues; and the Plaintiff cannot declare on that Withernam, for this is the Award of the Court upon his eloigning the Cattle, and if he is injured by the Return of the Sheriff, he has his Action against him.

If the Withernam be awarded against Offic. Brev. the Defendant, on Behalf of the Plain-tit. Withertiff on mesne Process, the Sheriff may take the Beasts of the Defendant to any Value, as a Pain to make him appear; and when the Defendant comes in, he will be fined in Court, and committed till he has paid that Fine, and gage Deliverance of the Beafts, and then he can have his own Goods restored that were taken in Withernam. and interplead with the Plaintiff; and here he cannot plead that either he did not eloign, or that the Beafts were See Salk. 581. dead in Pound, for that is contrary to L.Raym.613. the \* Elongata returned by the Sheriff,

Eloignment.

and not to be denied; but if it is false, he has Remedy against the Sheriff for his false Return.

out of which it dines, and the

If on the Withernam awarded against the Defendant, nulla Bona be returned, a Capias issues against the Defendant, and on that Capias if the Defendant be taken, he shall be in Custody until he has paid the Fine, and likewise gaged Deliverance; and if he be not taken, they proceed to Process of Outlawry.

Stat. West. 2. c. 2. See ante.

Upon the Retorno Habendo, if the Sheriff returns \* Elongata on the Plaintiff, then there is some Difference in the Books, whether they must proceed against the Pledges to have them amerced, and have Issues returned against them to the Value of the Beasts; or if they have nothing then to do, but to take a Withernam against the Plaintiff. But it seems by the better Opinion, as is here before mentioned, that they may have a Withernam immediately against the Plaintiff, on an Elongata returned by the Sheriff, and

<sup>\*</sup> Eloigned.

on such Withernam, they may take all the Beasts of the Plaintiff, until he has returned the Beasts to the Desendant; for it is a Pain to make him do the Thing required.

By the Judgment of a Fieri Facias, Capias and Elegit lie on the Award of the Judgment, if on the Withernam \* Bona be returned, then the Plaintiff's Goods are taken, and they shall not be delivered until the Plaintiff has paid his Fine to the King for his Contempt, and delivered his Beasts; if nulla Bona be returned on the Withernam, a Capias issued at Common Law against the Plaintiff for his Contempt, and if on the Capias the Plaintiff be taken, he shall lie by it until he has satisfied the Fine for his Contempt, and returned the Goods.

But by Stat. 17 Car. 2. c.7. if the Plaintiff in Replevin be nonfuit before Issue joined, the Defendant is to make a Suggestion, in Nature of an Avowry

<sup>\*</sup> Goods, and Through Sales III

<sup>†</sup> No Goods.

or Cognisance, for his Rent, and on this a Writ of Enquiry issues to ascertain the Arrears of Rent, and the Value of the Distress, and he shall have Judgment to recover the Rent, and Costs of Suit out of the Goods, if they are sufficient; if not, for so much as the Value of the Goods amounts to, and shall have Execution thereon by Fieri Facias or Elegit, or otherwise.—

The same Writ of Enquiry goes where a Demurrer is joined, and Judgment given thereon, and the same Enquiry by the Jury where Issue is joined.

## V. Of the Writ de Proprietate Probanda.

Reg. 83, 84, 85. Brev. Jud. 135. Co. Lit. 145.

If the Replevin be either by Plaint or by Writ, if the Defendant claims Property, the Sheriff's Power to replevy the Beafts is at a stop, because the Defendant claiming the Beafts as his own, the Sheriff cannot redeliver that Property to the Plaintiff which is claimed by the Defendant, and therefore if the Replevin be by Plaint, the Jurisdiction is at an End by such Claim, till the Plaintiff purchases the Writ

Writ \* de Proprietate Probanda, because no Controversy of Property can be determined in the County Court without the King's Writ.

On the purchasing of this Writ an Dalt. Sher. Inquest of Office is holden, and if on 435. fuch Inquest the Property be found for the Plaintiff, the Sheriff is to make Deliverance; but the Defendant may remove it by Recordari, and put in his Plea of Property above, and it shall be determined by a Verdict; but if the Inquest of Office find for the Defendant, there is an End of the Replevin by Plaint, because the Property is found for the Defendant, and so no Redeliverance can be made by the Sheriff; but the Plaintiff may bring a new Replevin by Writ, for what is done on the Plaint is no Bar, nor has it any Concern with the Proceeding upon the Writ.

But if the Replevin were by original Writ, and the Defendant claims Property, the Sheriff cannot make Deli-

<sup>\*</sup> Of proving the Property.

verance no more than he could upon the Plaint, and therefore the Sheriff in fuch Case returns such Claim of Property on the \* Causam nobis significes; on the Alias and Pluries on the Replevin, as a Cause why he cannot execute the Writ; and on this Return of the Sheriff the Writ + de Proprietate Probanda iffues, that the Plaintiff may not want his Beafts in the mean Time. and if the Property be found for the Plaintiff, orders a Redeliverance to the Plaintiff, and gives the Defendant a Day in Court; and the Plaintiff may not only declare on the unjust Caption, but on the subsequent Injustice of the Defendant, in claiming the Goods as his own; and here the Defendant may likewise set up his Claim of Property, and try it over by Verdict, where the Matter will be determined under Peril of an Attaint. But if this Claim be found against the Defendant on the Inquest of Office below, he is subject to a Fine for his false Claim of Property, whereby he

<sup>\*</sup> Signify the Cause to us.

<sup>+</sup> Of proving the Property.

has stopped the Course of Replevin by hindrance of the Deliverance of the Goods, which is a Contempt of the Court, and subjects him to a Fine, as likewise to Damages to the Party, who wants his Goods in the mean Time. The Desendant must appear in proper Person to answer his Fine to the King, but after Payment of the Fine he may appear by Attorney; but until the Payment of the Fine, he must plead in Person.

Tesanot claim Property

But if the Verdict be found for the Brev. Jud. Defendant in the Writ \* de Proprietate 135, 136, 136, 137; Probanda, there is an End of the Replevin, as well by Writ as by Plaint; for the Sheriff is not by the Writ \* de Proprietate Probanda to deliver the Goods to the Plaintiff, unless the Jury finds them to be the Plaintiff's; and if the Defendant has the Goods and possesses them as his own, they cannot proceed on an Action, which supposes the Goods to be re-delivered to the Plaintiff; but if the Plaintiff has any Right to them, since the Possession by

<sup>\*</sup> Of proving the Property.

the Inquest is established on the Side of the Defendant, the Plaintiff cannot get back his Poffession of the Goods until he has established his Right in an Action of Law for the same, and therefore he may bring his Action of Detinue, Trover or Trespass, for the Recovering of the Goods, but cannot continue his Action, whereby the Posfession should be delivered to him, Fitz. Abr. tit. Propr. Prob. 5. & per tot.

Co. Lit. 145.

A Bailiff cannot claim Property be-Q. Lev. 90. low when the Sheriff comes to make Replevin, because being only Servant to another, in whose Right he has taken the Goods, he cannot say they are his own, and therefore cannot hinder the Sheriff from delivering the Goods ac-

Thef. Brev. 170.

Bro. Jud. 137. cording to the Command of the Writ, as the Proprietor might. - For though a Man by claiming Property may prevent his own Goods being delivered, yet he cannot hinder other People's Goods, because the Sheriff cannot hear any Stranger to interpose against the obeying the King's Writ; but the Owner himself shews a just Cause why the Goods should not be delivered until further Enquiry; but the Bailiff Bailiff above may plead Property in a Stranger, for this is a sufficient Reason to excuse him from Damages, since he has not taken the Plaintiff's Goods from him.

VI. Of the Process for removing the Cause out of the inferior Court.

Since the Replevin is vicontiel, and determinable in the inferior Court, where the Suitors are Judges both of the Law and the Fact, and fince the Suitors are not awed by the Peril of an Attaint, nor the Matter of Law determined without Danger of false Judgment, from their Ignorance or Partiality, the Law hath appointed two Writs to remove such Causes out of inferior Courts into the superior, and those are the Pone and Recordare.

The Pone is when the Proceeding is 2 Inft. 339. by Writ of Replevin, for when a Writ of Replevin issues, and it is returned out of the County Court, that gives the Judges above Authority to proceed thereon, whether the Proceeding below be recorded or not, for the Judges K want

want no Record from below when they have the King's Writ with them.

But the Recordare is to record the Proceedings, and when recorded, to return them into the King's Bench or Common Pleas; fo that it gives Authority to record those Proceedings that were not of Record before; therefore if the Replevin were by Plaint, it must be removed by Recordare, because the Courts must have their Authority by Proceedings returned of Record.

We shall consider each of them separately.

## I. Of the Pone.

F.N.B.69.M. If the Replevin be removed out of the County Court into the Common Pleas, the Writ of *Pone* shall be as follows:

> \* Rex Vic. Linc. Salutem. Pone, ad Petitionem petentis, coram Justiciariis nostris

<sup>\*</sup> George the Second, &c. To the Sheriff of, &c. Greeting: Put by upon the Petition of the Peti-

nostris apud Westm. (tali die) loquelam quæ est in Com. tuo per breve nostrum, inter A. & B. de Averiis ipsius A. captis & injuste detentis, ut dicitur, & Summoneas per bonos Summonitores præd. B. quod tunc sit ibi, præsato A. inde responsurus, & babeas ibi Summonitores & boc breve.

And if it be removed into the King's Bench, then the Writ is such:

\* Rex, &c. Pone ad Petitionem petentis, ubicunque tunc fuerimus in Anglia loquelam, &c.

The Reason why he is summoned in this Writ is, that the Desendant being already attached in the Court

Petitioner before our Justices at Westminster (such a Day) the Plaint which is in your County by our Writ between A. and B. of the Beasts of said! A. taken and unjustly detained as is said, and summons by good Summoners the aforesaid B. that he be then there to answer the aforesaid A. hereof, and have there the Summoners and this Writ.

\* George the Second, &c. Put by on the Petition of the Petitioner wherefoever we shall then be in England, the Plaint, &c.

below, and having appeared, it is prefumed he would have come in upon the Summons, and when he hath appeared below to avow his Distress, it is not to be supposed that the Caption is an unlawful Caption, on which he should be attached; and therefore when the Plea is removed, the Entry is, \* Quod defendens Summonitus fuit ad respondendum.

The Plaintiff may remove out of the County Court, either by Pone or Recordare, without Cause shewn, for it is his own Delay; but the Defendant cannot remove without Cause shewn, for since it is in Delay of the Plaintiff, a just Cause ought to appear upon Record for such Removal.

Reg. 84. There are several Causes of Removal F.N.B.70. A. at Common Law; as if either Party were related to the Lord, or Sheriss, &c. but the Stat. of West. 2. c. 2. hath added one Clause, and that is, if the Desendant distrains for Custom and

<sup>\*</sup> That the Defendant was summoned to answer.

Services, and the Plaintiff pretend to be out of his Fee; for by this Means the Plaintiff recovered his Beafts, and drove the Lord to his Custom and Services, whereby the Lords were often dispossessed of their Distresses; and therefore this Statute provided that such Defendant should upon such Pretence of the Plaintiff, remove the Plea into the superior Courts, and try the Tenure in this Action.

And the \* Cause of Removal is inferted in the Writ, after the Teste thereof, in this Manner:

† Quia C. Clericus D. Vicecomitis prædicti qui frequenter in absentia Vicecomitis illius tenet placita ejusdem

\* The Sheriff cannot return that the Cause is not true. Per Rolph. 7 H. 6. 32.

<sup>†</sup> Because C. Clerk of D. the Sheriff aforefaid, who frequently in the Absence of that Sheriff holds Pleas of the same County, is akin to the aforesaid A. wherefore the same Sheriff savours the aforesaid A. in the Plaint aforesaid, as is said, Let this Writ be executed if the Cause be true, and the aforesaid A. petitions for it, and otherwise not.

Comitatus, est Consanguineus prædicte A. propter quod idem Vicecomes favet ipsi A. in loquela prædicta ut dicitur, Fiat executio istius brevis, si causa sit vera & præd. B. petit, & aliter non.

Or thus: \* Quia præd. B. cepit averia præd. in feodo suo pro Consuetudinibus & servitiis sibi debitis, ut dicitur, Fiat executio, &c. ut supra.

Or thus: † Quia præd. B. clamat præd. A. esse Nativum suum, & ed occasione asserit averia præd. esse sua propria, propter quod loquela illa in Comitatu deduci non debet, ut dicitur, Fiat executio, &c. ut supra.

<sup>\*</sup> Because the aforesaid B. took the Beasts aforesaid in his Fee for the Customs and Services due to him, as is said, Let Execution, &c. as above.

<sup>†</sup> Because the aforesaid B. claims the aforesaid A. to be his Relation, and upon that Account afferts the Beasts aforesaid to be his own, whereupon that Plaint ought not to be carried on in the County, as is said, Let Execution, &c. as above.

But notwithstanding the said Causes, 10 Ed. 2. Athe Desendant may avow for Damage-vowry 213, feasant, for the Cause of Removal is 515. 20 Ed. 3. Anno material Part of the Writ, nor is it vowry 130. traversable, and therefore the Desendant may justify the Taking and Detention of the Distress in any other Manner.

But if either Plaintiff or Defendant F.N.B. 70.A. removed the Suit out of the Lord's Court, they ought to shew Cause, because they should not oust the Lord's Court of the Profits of such Jurisdiction without apparent Reason.

And it seems that such Causes used anciently to be examined, before such Writs were granted; as in Chancery they used to examine the Cause of Action before the granting of original Writs; but this in both Cases is now neglected, and such Writs issue of Course.

And the Cause of Removal out of F.N.B.70. A. the Lord's Court shall be shewn in this Reg. 84. b. Manner:

\* Quia prædictus Abbas est Dominus Curiæ de C. in quâ loquela illa pendet per retornum brevis nostri, propter quod idem A. in loquela præd. in eadem Curiâ justitiam consequi non potest, ut dicitur, Fiat executio, &c.

Or thus: + Quia J. Ballivus K. Archiepiscopi Cantuar. Curiæ suæ de N. coram quo loquela illa pendet, per retornum brevis nostri in eâdem Curia implacitatur per præd. B. de quodam debito 20 Marcarum, coram præf. Justiciariis nostris per breve nostrum, propter quod idem Ballivus in odium

Because the aforesaid Abbot is Lord of the Court of C. in which that Plaint hangs by the Return of our Writ, wherefore the same A. cannot obtain Justice in the Plaint aforesaid in the same Court, as is said, Let Execution, &c.

<sup>+</sup> Because J. Bailiff of K. Archbishop of Canterbury, of his Court of N. before whom that Plaint hangs, by the Return of our Writ in the same is impleaded by the aforesaid B. of a certain Debt of 20 Marks, before our Justices aforesaid by our Writ, by Reason whereof the same Bailiff out of Hatred to the said B. savours the said A. in his aforesaid Plaint, as is said, Let Execution, &c.

ipsius B. favet ipsi A. in loquelâ suâ præd. ut dicitur, Fiat executio, &c.

And note, that the former Conclufion is proper when the Plea is removed at the Suit of the Plaintiff; but the latter when it is removed at the Suit of the Defendant.

If the Plaint be removed by the 21 H. 6. 50. Defendant by Pone at the Day in Bank, F.N.B.70. A. in the Notes. the Plaintiff shall be demanded under the Peril of a Nonfuit, and if he make Default, a Return shall be awarded, and no Process; but if the Plaintiff appears, and the Defendant makes Default, a Distringas shall issue, and on Nulla bona returned, then a Capias and Process of Outlawry. So if the Plaint be removed by Pone or Recordare by the Plaintiff, there if he makes Default he shall be nonsuit; if the Defendant makes Default, then shall issue a \* Pone per vadios, and so Process of Outlawry.

Wherever

<sup>\*</sup> Put by Gages.

Wherever the Defendant hath Day in Court by the Writ, there the Plaintiff is demandable under Peril of a Nonsuit, for he bringing another in, ought to attend himself; and if he has brought the Defendant into the Court below, if the Defendant removes it above, he thereby gives himself and the Plaintiff a Day in the Court above; for the Plaintiff, having put in Pledges of Profecution, ought to follow the Writ, and wherever Day is given, there he may demand the Plaintiff, under Peril of a Nonfuit; but where Day is given to the Defendant by the Writ, there no Judgment can be against him till he appears, for that would be to give Judgment \* parte inaudita; and therefore tho' he himself removes the Plaint by Recordare, whereby he gives himself a Day in the fuperior Court, if he does not appear at the Day, they must carry on the Process to make him appear, tho' he has appeared in the Courts below, fince fuch Appearance does not give Authority to the Court above to proceed, unless he has first appeared there; but

One Side unheard.

there is Judgment of Nonsuit against the Plaintiss if he does not appear, for his Non-appearance is not prosecuting his Plaint, which is a Nonsuit.

\* Pone (at the Suit of the Defen- 3 H. 6. 2. dant) + loquelam quæ est in Comitatu in the Notes. tuo inter A. & B. de Averiis ipfius A. captis, &c. and fays, | præfato B. where it should be ‡ præfato A. Rolph came for A. the Plaintiff, and prayed Damages, for that otherwise the Plaintiff had no Remedy; for the Pone is abated, fo the Court is without Warrant: Yet it shall not be remanded, 12 H. 4. 14. for the County Court and the Courts 3 H. 6. 2. above are the Courts of the King; and 4 Inft. 266. a new Pone doth not lie, because the Plaint is here. Baker, Martin and Preston contra; a Pone or Recordare is but to remove the Plaint, so that when the Plaint is removed, the Pone or Recordare shall never abate, for that the Court is possessed of the Plaint;

<sup>\*</sup> Put by.

<sup>†</sup> The Plaint which is in your County between A. and B. of the Beafts of the faid A. taken, &c.

Aforefaid B.

Aforefaid A.

but yet the Plaintiff hath not a Day in Court, because such Writ not being good, cannot give the Plaintiff or Defendant a Day; therefore the Court may take a special Writ to the Sheriff to warn the Plaintiff to pursue the Plaint, and so it was done in this Case.

F.N.B.69.M. in the Notes.

The Plaint is well removed, althouthe Pone bear Date before the Plaint entered. 1 R. 3. 4. So if the Plaint be removed by Certiorari, where it ought to be by Pone or Recordare. See 7 E. 4. 23. So if one Plaint be removed where another ought to have been, ibid. or where there is a Variance between the Plaint and the Writ. 6 Ed. 3. 55. 8 Ed. 3. 71. Cro. Eliz. 543. See Moor 30. contra.

## II. Of the Writ of Recordari.

F.N.B. 70.B. When the Plaint is in the County, and the Replevin sued there without Writ, then if the Plaintiff or Defendant will remove that Plaint, he ought to sue a Writ of Recordari out of the Chancery, directed unto the Sheriff, and the Writ shall be such:

\* Rex

\* Rex Vic. Linc. Salutem. Præcipi-Reg. 85.
mus tibi, quod in pleno Com. tuo Recordari facias loquelam, quæ est in
eodem Com. sine brevi nostro, inter A.
& B. de averiis ipsius A. captis & injuste detentis, † ut dicitur, & recordum
illud babeas coram Justiciariis nostris
apud West. (tali die) &c. sub sigillo tuo
& sigillis quatuor legalium Militum
ejusd. Com. ex illis qui recordo illo in-

† Note, these Words, || ut dicitur, are only in the Writ when brought by a common Perfon, and not by the King. 38 Ed. 3. 31.

terfuerunt;

<sup>|</sup> As is faid.

<sup>\*</sup> George the Second, &c. To the Sheriff of, &c. Greeting: We command you that you cause to be recorded in your full County the Plaint which is in the fame County, without our Writ, between A. and B. of the Beafts of the faid A. taken and unjustly detained, as is faid, and have the Record before our Justices at Westminster (such a Day, &c.) under your Seal and the Seals of four lawful Suitors of the fame County with those who were present at the recording it, and fix the fame Day to the Parties that they were there, and proceeded in that Plaint according to Justice, and have there the Names of the faid four Suitors, and this Writ. Witness, &c. Let this Writ be executed if the aforesaid A. petitions for it, and otherwise not.

terfuerunt; & partibus eundem diem figas, quod tunc sint ibi, in loquelâ illâ, prout justum fuerit processuri; & babeas ibi nomina præd. quatuor Militum, & boc breve. Teste, &c. Fiat executio istius brevis, si præd. A. hoc petat, & aliter non.

It appeareth that the Plaintiff may remove the Plaint by Recordari, with-

\* See 20 Ed. 3. 21. where Beafts were taken in D. in the County of Wilts, which was within the Precincts of the Honour of Walling ford in the County of Berks, where the Plaintiff had Deliverance without Writ, and the Defendant fued a Recordari to the Sheriff of Berks, + Quia distrixit in feodo, and the Plaintiff came; but the Defendant made Default, and it was adjudged: I. That the Parol was well removed, notwithstanding the Taking was in another County. 2. That Process of Outlawry did not lie here, without a Default of the Defendant, as it does in Replevin. 3. That yet if he came in by Process of Outlawry, he should be put to 4. That he might avow Damageanswer. feafant, notwithstanding this special Cause affigned. Note; the Beafts were driven into the County of Berks, where the Castle and Court of the Honour of Walling ford was. Dyer 168.

<sup>+</sup> Because he distrained in his Fee.

out any \* Cause put in the Writ; but the Desendant cannot remove the Plaint without shewing Cause in the Writ, as is before said upon the Pone. And the Causes for the Desendant ought to be such:

\* If the Plea be removed out of the Court of the Lord, (in Ancient Demesne, | ut videtur) the Cause is traversable; contra, if out of the Court of the King. 12 H. 4. 17. Mich. 50 Ed. 3. pl. 6. Fitz. Abr. tit. 1 Caufe de remover Plea, pl. 10. And if the Cause be infufficient, or none at all, yet the Parol shall not be remanded; otherwise if in Ancient Demesne; for upon a Recordari out of Ancient Demesne, the Plea is wholly upon the Cause, and therefore the Plaintiff may be nonfuit in fuch Recordari; but if it be out of any other Court, the Plea is upon the mere Matter, and therefore the Plaintiff cannot be nonfuit upon the Recordari, but it must be in the Action; the Reason is because Ancient Demesne is a Privilege going with the Soil, (fuch Manors being anciently composed of the King's Hufbandmen) and the Pleas cannot thence be removed without Caufe, because it would alter the Condition of the Soil, to be impleaded in the King's Courts without fuch real Caufe made

As it feems.

Cause to remove a Plea.

\* Quia præd. B. placitando in Com. præd. offerit se averia præd. cepisse in separali solo suo, ut in damno suo ibidem, in quo quidem solo præd. A. clamat communiam pasturæ, ut dicitur; quæ quidem loquela, eo quod tangit liberum tenementum (ut prædictum est) in eodem Com. secundum legem & Consuetudinem Regni nostri sine brevi nostro placitari non debet. Fiat executio istius brevis (si Causa sit vera) & præd. B. boc petat & aliter non.

And if a Replevin be fued by Plaint, in the Court of any other Lord than in the County Court before the Sheriff, then the Recordari which is fued by

Because the aforesaid B. by pleading in the County aforesaid, afferted that he took in his separate Ground the Beasts aforesaid, as in his Damage there, in which Ground the aforesaid A. claims Common of Pasture, as is said, which Plaint in as much as it concerns the Freehold (as is aforesaid) should not be pleaded in the same County, according to the Law and Custom of our Realm, without our Writ. Let this Writ be executed (if the Cause be true) and the aforesaid B. petitions for it, and otherwise not.

the Plaintiff or Defendant, shall be directed unto the Sheriff, and the Writ shall be thus:

\* Rex Vic. Linc. Salutem. Præcipimus tibi quod assumptis tecum quatuor
discretis & legalibus Militibus de Com.
tuo in proprid persond tud accedas ad
Curiam W. de C. & in illa plena Curia
recordari facias loquelam quæ est in
eadem Curia sine brevi nostro, &c. &
recordum illud babeas sub sigillo tuo, &
sigillis quatuor legalium bominum ejusdem Curiæ qui recordo illo intersuerint,
& partibus, &c. (ut supra) quia præd.
A. est Ballivus præd. W. de C. Curiæ

<sup>\*</sup> George the Second, &c. To the Sheriff of, &c. Greeting: We command you that you take with you four discreet and lawful Knights of your County, and go in your own proper Person to the Court of W. of C. and in that full Court cause to be recorded the Plaint which is in the same Court, without our Writ, &c. and have that Record under your Seal and the Seals of sour lawful Men of the same Court, who were present at the recording it, and to the Parties, &c. (as above) because the aforesaid A. is Bailiff of the aforesaid W. of C. of his Court aforesaid, and holds Pleas of the same Court, and ought not to be Judge in his own Cause.

suce præd. E tenet placita ejusdem Caria, E Judex in sua Causa esse non debet.

If the Plea be discontinued in the County, yet the Plaintiff or Defendant may remove the Plaint into the Common Pleas or King's Bench by Recordari, and it shall be good, and the Plaintiff shall declare upon the same, and the Court shall hold Plea upon the same Plaint; for if the Plaint be continued in the County Court, and Mue joined upon it, yet nothing shall

If the Defendant be without Addition in the Plaint, he shall not have Addition in the Recordari, altho the Process of Outlawry sie thereon. 2 H. S. 6. (30 H. 6. 30. accordingly) adjudged. For the Plea is not held on a Writ, but a Plaint only) and so not within the Intent of the Stat. of 1 H. 5. c. 5. Which speaks only.

of Writs Original, Sc.

Note; a Capias lies on a Default made by the Defendant, on a Pone brought by the Plaintiff in a Replevin by Plaint, but not upon a Default upon a Justicies. 3 H. 6. 54. See 14 H. 6. 21. Yet if a Withernam be awarded in a County, (after a Pone) the Plaintiff shall gage Deliverance of the Withernam here; for the Recordari made the Court judge of the whole Matter, 21 H. 6. 40. See 39 H. 6. Recordari 5. 20 Ed. 3. Recordari 10, 20.

be removed but only the Plaint, and in the Common Pleas the Plaintiff may declare \* de novo.

For the Pone and Recordari give the Defendant a Day in the Court above, and when at Common Law the Plaintiff and Defendant appeared at the Day, the Plaintiff counted and declared, and the Defendant avowed + ore tenus, that the Court might know the Cause of Complaint, and being in a new Court, it was all to be rehearfed in order that they might understand it; and this the rather, because being a superior Court, they were not bound by any Decision made on the Proceedings below, and this could be no Inconvenience in Replevin at Common Law, where the Plaintiff may bring his Replevin | toties quoties; and where the Defendant removed it, and gave another Day, it was upon Cause shewn of Inability or Partiality in the Courts below.

<sup>\*</sup> Anew.

<sup>+</sup> By Word of Mouth.

As often as.

But not only in Pone or Recordari is the Court to take no Notice of any Pleadings or Proceedings but what are rehearfed or recorded before them, but even in a Habeas Corpus, which is a Writ of Liberty, there the Plaintiff must likewise follow the Body of the Prisoner, and there declare against him \* de novo; for the Court cannot take Notice of the Pleadings rehearfed before inferior Judges; for those Records don't come up before them but by Writ of false Judgment, where the Court is not of Record, or by Writ of Error where it is, and therefore they have nothing to do with their Proceedings 'till there be Judgment against them.

But where they have the Body of the Defendant, the Plaintiff may proceed originally against him; so in *Pone*, where they have the original Writ they may proceed originally upon it, and the *Recordari* makes the Plaint of Record, for the Statute of *Marlbr*.

My Worl of Mouth.

<sup>\*</sup> Anew.

which gives the Plaint, does in the first Chapter provide that all Complaints of Distresses should come into the Courts of the King, which gives the King's Courts Authority to record such Plaint as was in the County.

The Words are, \* Et præterea, quidam eorum per Ministros Domini Regis
Justiciari non permittant nec sustineant quod per ipsos liberentur districtiones
quas Authoritate propria secerint ad
Voluntatem suam, Provisum est Concordatum & Concessum quod tam Majores
quam Minores Justiciam babeant & recipiant in Curia Domini Regis, & nullus de cætero ultiones aut districtiones

<sup>\*</sup> And moreover fome of them would not be justified by the Officers of the Lord the King, nor would suffer them to make Delivery of such Distresses as they had taken of their own Authority at their Pleasure. It was provided, agreed and granted, that as well high as low should have and receive Justice in the Court of the Lord the King, and that no one thereafter should take Revenge or Distresses without the Consideration of the Lord's Court in Case any Damage or Injury should happen to him, whereof he should defire to have Amends from any of his Neighbours whether high or low.

faciat per voluntatem suam absq; Confideratione Curiæ Domini, si forte Damnum vel Injuria sibi stat unde amendas babere voluerit de aliquo Vicino suo, sive majore sive minore.

By this Statute it appears that the Plaint tho' given for Expedition before the Sheriff might at any Time be removed and recorded in the Court of the King.

In a Recordari to remove a Record out of Ancient Demesne, the Writ shall say \* Loquelam & Processum, and not + Recordum quod v. 36 H.6. by all the Justices; yet the Form of the Register in the Recordari, as before is said, is | & Recordum illud Habeas.

In the Sheriff or Lord's Court, and in Ancient Demesne in all Replevins, the Plaint is called ‡ Loquela, because it is not a Record, as it is in their Court,

<sup>\*</sup> The Plaint and Process.

<sup>+</sup> Record, which fee.

And have that Record.

<sup>#</sup> A Plaint,

but in the Accedas ad Curiam, the Transmission of the Plaint by the King's Writ, under the Seals of four of the Suitors in the Presence of the Sheriff and four Knights, is called a Record, because it is sent to be a Record in the Courts above.

Where by Recordari the Record was 9 H. 6. 58. removed by the Sheriff out of the See Nat. Brev. Court of Chancery at Canterbury, it was faid, that the Court of Canterbury might have refused to obey the Writ, for being a Court of Record by Commission, the Plea ought not to be removed by \* Recordari, but by + Habeas Corpus cum Causa or Certiorari; and it was held, that in as much as the Plea was come hither without Warrant, all was void, and that therefore the Court could not remand it, for the Record remained at Canterbury; and if no Proceeding there according to the Suit of that Court, it was difcontinued. Yet vide Reg. 6, 7. a. a

<sup>\*</sup> Cause to be recorded.

<sup>†</sup> Have the Body with the Cause, or certify.

Recordari on a foreign Voucher out of Chester.

The Reason is because the Recordari is to return a Loquela, and when the Proceedings are in a Court of Record, it is not a \* Loquela, but a Record in its own Nature in the Court below.

Again, the Recordari supposes a Partiality in the Court below, which cannot be supposed in a Court of Record, acting under the King's Commission; nor have the superior Courts any inherent Right to judge of what any other inferior Court of the King is possessed of, 'till it comes before them by + Habeas Corpus cum Causa, or by Certiorari. The Habeas Corpus is the Writ of Liberty. The Law hath that Tenderness for the Liberty of a Man, that when any Person is imprisoned, he may purchase a Writ to any superior Court; and if any of these Courts see Cause on the Return to discharge him, he shall be freed;

<sup>\*</sup> The Plaint.

<sup>†</sup> Have the Body with the Cause.

from hence it is that the Body must be sent, and the Cause of Imprisonment must be sent with it.

A Certiorari also is to return the Proceedings on another Ground: All inferior Courts are of definite and bounded Authority, and cannot award Execution out of the District; therefore lest Justice should fail, Process of Certiorari goes to remove the Record into the upper Courts; and both these Ways have been used to give Jurisdiction to the upper Courts.

The Certiorari coming to remove a Record on Supposition that inferior Jurisdictions may exceed their Bounds, they must send the Record in the Condition it was when the Certiorari came to them; but it stops their Proceedings from the Time they receive it.

If a Record be removed out of a Court of Record by a Recordari, it cometh in without Warrant, and the Court shall not hold Plea thereof.

Al a ch of But

But if a Record cometh in Court without a Warrant, the Party may fue a Writ directed unto the Justices, that they may proceed upon that Record \* quod coram vobis residet.

The Meaning of the Distinction is this, that when a Recordari is fent down to a Court of Record to remove a Replevin there depending, they may proceed and not obey the Writ, because that Replevin is of Record in the King's Court, and consequently + in Curia Regia according to the Statute, and therefore the Writ to make it a Record is | actum agere; but if they do obey the Writ, and fend the Record, they cannot afterwards proceed upon it, because they have sent it away from them, and the Court above cannot proceed upon Records of another, as they do in Replevin on the Plaint sent before them by Recordari; and therefore there must be a Writ to

<sup>\*</sup> Which remains with you.

<sup>+</sup> In the King's Court,

To do a Deed,

give them Authority to proceed on the Record \* quod coram vobis residet.

But they have an inherent Authority to see that other Jurisdictions do not exceed their Limits; and therefore when they fend a Certiorari to remove fuch Record, they ought to proceed above on the Plaint entered in the County; yet the Record is well removed, because that both Courts are the Courts of the King. But if the Record be removed out of the Court of any other Lord by fuch Writ, which beareth Date before the Plaint, it is not good: The Reason is, because the Sheriff's County being held or farmed from the King as immediate Deputy, the King may remove the Replevin out of the Sheriff's Court into his own without any Cause shewn; and therefore it is not material whether the Recordari be tested before the Plaint or not; but where the Record is removed out of the Lord's Court, where there is a Jurisdiction by Grant or Prescription, there must be Cause shewn for

<sup>\*</sup> Which remains with you.

fuch Removal; and fuch Cause will be absurd if the Accedas ad Cariam bears Date before the Plaint, for that cannot be a Cause to oust the Lord of Jurisdiction which was not in Being at the Time of the Writ issuing; and althouthe Desendant cannot remove the Plaint without Cause, yet this is not to ous the Sheriff of Jurisdiction, but that the Plaintiff may not be delayed without good Cause shewn.

VII. Of Replevin itself, and herein are to be confidered,

- 1. For whom and in what Cases it lies.
- 2. The Declaration in Replevin.
- 3. The feveral Pleas in this Action; and herein of the Avowry.
- 4. Of the Judgment in this Action, whether for the Plaintiff or Defendant; and herein of the Writ de Retorno Habendo, and of the Writ of second Deliverance.

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NAME OF TAXABLE

I. For whom and in what Cases it lies.

The Replevin lies as well for Goods Bro. Abr. tit. in which I have only a qualified Pro- 2 Ro. Abr. perty, as for those in which I have the 430. absolute Property; as if Goods be laid Bro. tit. Repl. in my Hands in order to be delivered Doct. Plac. over to J.S. and J. N. takes them 314. from me, I may have a Replevin against J. N. to bring back these Goods into my own Possession, because I have a Right to the Poffession of these against every Body but J. S. and therefore as J. N. is a Trespasser for violating that Possession, so I may qualify that Tort he hath done by bringing the Replevin which complains of the unjust Taking, and that J. N. detains them \* contra Vadios & Plegios.

So it is if Cattle be farmed to me to manure my Land, if they be taken out of my Custody, I may bring Replevin for them, because during the Term I have the Use of them, and

<sup>\*</sup> Against Gages and Pledges.

therefore the Caption and Detention of them by any Person is unlawful. which is the Injury complained of in the Replevin; or I may have in this Cafe a special Replevin, setting forth my special Property.

2 Ro. Abr.

If A. takes my Goods by the Comagainst both, because in Trespal's both are Principals, and equally guilty of the unjust Caption and unjust Detention.

2 Ro. Abr. 430. 1 H. 4. 18. Bro. Abr. tit. Repl. pl. 14, g Co. 22. b. 23. 2.

If the Lord distrains the Beasts of the Tenant, and the Meine puts his own Beafts in the Pound in Lieu of the Tenant's, the Meshe may afterwards have a Replevin for his own Beafts, and the Lord can't plead that the Beafts of the Tenant, and not of the Mesne, who is the Plaintiff in Replevin, were taken, because the Tenant having paid his Rent to the Mesne, the Mesne is thereby obliged to defend the Tenant from the Lord's Diffres; but this cannot be done unless the Mesne becomes Party to the Suit, and be substituted in the Place of the Tehant.

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By this Means the Meine may thew the Services performed to the Lord for which the Diffress was taken, and confequently that the Tenant ought not to be disturbed; and hence it is, that the Writ of Mefne is allowed to the Tenant, to bring in the Meine if he does not come in of himself, because the Tenant being a Stranger to the Transactions between the Lord and the Mesne, he cannot defend against the Lord but by the Melhe, and therefore where the Merne is to take the Defence, it is but fit he should be allowed to pledge his own Cattle, and discharge his Tenants, and the Lord hath no Prejudice, because there is still a good Pledge to answer his Services if there be any due; so and for the same Reason it is, if my Leffor diffrains my Tenant, I may put my Beafts in the Pound in Lieu of my Tenant's, and then replevy them as if they had been originally taken.

Several Persons cannot join in one 3 H. 4: 16.
Replevin for several Chattels, where Bro. Abr. tit.
Repl. pl. 12.
the Property of them is several, be-Doct. Plac.
cause where several Distresses are taken 315.
by Co. Lit. 145.

by the same Person of different Men, each hath a several and particular Injury done him, if the Distresses be unlawful, and therefore they can't jointly complain of an unjust Caption and Detention where the Property is several; for what Reason have I to complain, or to seek Redress in my own Name, for an Injury supposed to be done to another?

2 Ro. Abr. 430. Bro. Abr. tit. Repl. pl. 64. Doct. Plac. 314. If Beasts which are \* feræ Naturæ be reclaimed by me, and are distrained or taken out of my Custody, I may have a Replevin for them, because I have a Property in them while they continue with me; but this Property only remains while they are in my Possession, or retain the + Animum revertendi; and therefore if they leave me of themselves, and another takes them while they are out of my Possession, and they have not the + Animum revertendi, I cannot have a Replevin for them, because in such a Case I have no Property in them.

<sup>\*</sup> Wild Beafts.

<sup>†</sup> The Inclination to return.

If a superior Jurisdiction award an Lev. Ent. 152. Execution, it feems that no Replevin Raft. Entr. lies for the Goods taken by the Sheriff 275. by Virtue of the Execution; and if Bro. Abr. tit. any Person should pretend to take out Repl. pl. 22. a Replevin, and execute it, the Court of Justice would commit them for a Contempt of their Jurisdiction, because by every Execution the Goods are in the Custody of the Law, and the Law ought to guard them, and it would be troubling the Execution awarded, if the Party on whom the Money was to be levied should fetch back the Goods by a Replevin; and therefore they construe such Endeavours to be a Contempt of their Jurisdiction, and upon that Account commit the Offender, But if any inferior Jurisdiction issues an Execution, a Replevin will lie for the Goods taken by that Execution, because the inferior Jurisdiction being restrained within particular Limits, the Officer who took the Goods is obliged to shew that he took the Goods within those Limits, and that the inferior Court which issued the Execution did not exceed their Authority in issuing it; besides an inferior Court of Record cannot

3 Lev. 204. Aylesbury v. Harvy.

cannot commit for Contempt out of the Court: And hence it is, that the Officer of an inferior Court is to shew by what Authority he took the Goods. Thus in a Replevin the Defendant was put to justify by a Condemnation before a Justice of Peace for not entering of strong Waters, and a Warrant on that for levying 20 s. Fine on the Plaintiff.

3 H. 7. 1. Bro. Abr. tit. Repl. pl. 33. 51. contr.

A Replevin doth not lie against the King, nor where the King is Party, Vide ibid. pl. nor where the Taking is in Right of the King; and if such Replevin should be granted, the Sheriff ought to forbear to execute it, when he is informed the King is Party, because all the King's Debts are of Record, he taking nothing but by Matter of Record; and therefore the Cattle are seized for the King's Debts by the Levari Facias, which is a Writ of Execution, and confequently no Replevin lies against the King, any more than it does for the Goods taken in Execution at the Suit of common Persons.

Executors shall have Replevin for Bro. Abr. tit. the Goods of the Testator taken in his Repl. pl. 56. Sid. 80.

Life, because the general Property is in Arundel v. the Executors, and the Possession ought Trevyl. Rast. Ent. 560, 561. cutor may recover the Possession by this Writ of Replevin.

If the Goods of a Feme Sole be F.N.B.69.K; taken and she marries, the Husband alone may sue the Replevin, because the Property is transferred by the Marriage, and vested absolutely in the Husband, so that he may release it, and consequently he may have an Action in his own Name to bring back the Property.

In Replevin for a Sow and Pigs, Bro. Abr. tit. the Defendant as to the Sow avows Repl. pl. 41.

\*\* Damage Feasant, and for the Pigs pleads + non cepit: The Jury found for the Defendant as to the Sow, and for the Pigs they found that the Sow farrowed them after she was distrained,

<sup>\*</sup> Doing Damage.

<sup>+</sup> He did not take them.

and in the Possession of the Defendant: and the Plaintiff had Damages for the Pigs on this Plea of \* non cepit, because the Pigs were taken by the Defendant as well as the Sow, tho' they were not + Damage Feafant; and therefore the Defendant should have fet forth the special Matter as to the Pigs.

Bro. Abr. tit.

No Replevin lies for Charters re-Repl. pl. 34. lating to the Inheritance, because the Charters are reckoned Part thereof, and as fuch descend with it to the Heir, and not being efteemed in Law Chattels, are not by Law replevisable.

2 Show. 91. Nightingale w. Adams.

A Replevin doth not lie for Goods taken in foreign Parts, tho' afterwards brought into the Realm, because such a foreign Caption might have been justifiable according to the Law and Custom of the Place where it was made, tho' it may be illegal by our Law; and therefore fuch Caption ought not to be tried with us.

<sup>\*</sup> He did not take them.

<sup>†</sup> Doing Damage.

If Beasts be taken in one County F.N.B. 69. I. and carried into another, the Plaintiff Doct. Plac. may have his Replevin in either County, because it is a Caption in every County where they are taken by the Defendant.

This Writ of Replevin is always Regr. 81 b. executed by the Sheriff, even in his Bro. Abr. tit. own Case, where he distrains the Goods 65. of another, because this Writ is a fusicies to the Sheriff, on which he is to hold Plea in his County Court; and therefore no other can intermeddle in the Execution thereof but the Sheriff, who is to preside over the Suitors as Judge therein.

## II. Of the Declaration in Replevin.

And this is little more than a Hob. 16.

Transcript or Recital of the Writ it- Moor 678.

Moor 678.

Moor 678.

Moor 678.

Moor 678.

Mod. 199.

felf; but in the Declaration you must Dost. Plac.

not only alledge that the Defendant 315.

Bro. Abr. tit.

took the Beasts at such a Place, but Repl. pl. 47.

also you must alledge the + Locus in 2 H. 6. 14.

Cro. Eliz. 896.

Ward v. Savil.

<sup>†</sup> Place wherein.

quo, as \* in quodam Loco ibidem Vocato. &c. for it is not enough to alledge fuch a Place from whence the Venue may come, but the Place must be so particularly specified as to give the Avowant an Opportunity to shew that he had a Right to take the Goods in that particular Place, because the Right of the Caption may turn on the Place, and in this Action the Freehold may come in Dispute; and therefore it is necessary to specify the Place particularly wherein the Beafts were taken. which is equivalent to the new Affignment in Trespass; and if the + Locus in quo be not particularly specified in the Count, the Defendant may demur specially, and shew it for Cause, for the Defendant may justify the Taking in that particular Place for Causes he could not have any where else; but if the Defendant should plead I non cepit, the Count would be good, because then the Place cannot be material when the Defendant denies the Taking.

<sup>\*</sup> In a certain Place there called.

<sup>+</sup> Place in which.

He did not take them.

The Writ of Replevin is \* quod ce- 2 Lutw. 1150. pit averia & injuste detinet contra Va-Petree v. dios & Plegios, to which Writ the Duke.
Sheriff returns + Replegiari feci, there Co. Ent. 610, you go on in the Replevin only for 611. Damages for the Caption, and then in the Count you recite the Writ in the Detinuit, and Count in the Detinuit for Damages, and tho' the Writ be taken out in the ‡ Detinet, yet when the Sheriff hath returned + Replegiari feci upon it, that Return is a Warrant to recite the Writ in the Detinuit. for if the Writ was recited in the Detinet, and the Count was in the Detinuit, it wou'd be a Variance for which the Judgment may be arrested, or the Defendant might have demurred: But where the Sheriff does not replevy the Beasts, there you must recite the Writ in the Detinet, and Count in the Detinet also, because the Beasts are not delivered; and there you recover as

<sup>\*</sup> That he took the Beasts and unjustly detains them, against the Gages and Pledges.

<sup>†</sup> I have replevied.

<sup>||</sup> Detained, or præterperfect Tense.

<sup>†</sup> Detains, or present Tense.

well the Value of the Beasts in Damages, as Damages for the Detention, and this is a shorter way than to sue a Withernam and Cap. for a Return of the Beasts.

- III. Of the several Pleas to this Ac-
  - 1. Pleas in Abatement.
  - 2. The General Issue, non cepit.
- 3. The Justification; and this of two Sorts, either disaffirming Property in the Plaintiff, or admitting it.
- 4. The Avowry.
  - I. Pleas in Abatement.

the the restriction of the

There is a Difference between Pleas in Abatement of the Writ in Replevin and in other Actions; for in other Actions the Pleas in Abatement go merely to the Form of the Writ, because other Actions are for Debt or Damages, in which the Plaintiff hath no Possefsion of the Thing itself till Judgment and Execution, and therefore the Pleas in Abatement are to the Form of that Writ only, and all Pleas to the Right are in Bar of it.

But in Replevin, the Deliverance of the Goods is immediate, so the Plaintiff hath the Possession before the Defendant can plead thereunto; and therefore, according to the Genius of this Action, Pleas that are in Abatement must give the Defendant a Title to the Return of the Beafts; for it is not enough merely to quash the Writ, as in other Cases where the Defendant is \* in Statu quo where the Writ is quashed, but in this Action, that the Defendant may be \* in Statu quo, he must not only shew that the Writ ought to be quashed, but that he ought to have a Return of the Beafts himfelf; and here the Pleas in Abatement differ only from the Pleas in Bar in this, that in the Abatement they do not avow or acknowledge the Caption and Detention, which is the Gift of the Action, but they must go so far as to entitle the Defendant to a Delivery,

<sup>\*</sup> In his former Condition.

or else they don't take away the Force and Effect of the Writ of Replevin, which is always executed by the Delivery.

2 Lev. 92. Vent. 249. . Salk. 5, 92. Carth. 243. 984.

Therefore in this Action the Defendant may plead Property in himself in Abatement, for by fuch Plea he L.Raym.217, doth not deny, or confess and avoid the Caption, and therefore it is not a Bar, but only shews that the Plaintiff hath not a Right to a Deliverance, and by shewing that, the Goods ought to be returned to the Defendant on fuch Abatement, as they were before the Writ was taken out. But quære; for it feems by the later Authorities, that it should be pleaded in Bar.

Mod. Caf. 81. Vent. 249.

If the Defendant pleads Property in J. S. a Stranger, this may be in Abatement, because he shews that there is no Property in the Plaintiff, and by Confequence that he had no Right to a Deliverance by this Writ, and therefore he ought to have Return without making any Conusance.

Mod. Caf. 103.

If the Defendant pleads Property in the Plaintiff and J. S. there the Plea is in Abatement of the Replevin, as it is in other Actions, for the it admits a Right of Deliverance in the Plaintiff, yet it does not allow it by a Writ under the present Form, but gives a better Writ to be brought by the Plaintiff and J. S. but here the Desendant ought to make a Conusance, because this Plea not disaffirming the Property, it reaves a Right in the Plaintiff to have his Beasts without such Conusance be made,

As a Man may plead in Abatement Rast. Ent. 554. of the Writ, so he may of the Count, and by abating the Count he doth in Consequence abate the Writ, and there it is pleaded \* ad Narrationem & breve, for if a Man doth not pursue his Writ by a regular Count, his Writ in Consequence is abated; and therefore if a Man declare of a Caption in Blackacre, and the Defendant pleads in Abatement of the Count, that he took them in Whiteacre, † absq; boc that he Cro. Eliz. 372. Mod. Cases

103. Bro. Abr. tit. Repl. pl. 31, 45. Vent. 127. Salk. 93. Carth. 139.

<sup>\*</sup> To the Declaration and Writ.

<sup>†</sup> Without that.

took them in Blackacre, this will abate the Count under that Form. But then he must go over and make Conusance, because not disaffirming the Plaintiff's Title to the Beafts, he leaves the Plaintiff a Right to retain; but this Conufance is not traversable where it is pleaded in Abatement, because the Plaintiff must maintain the Form of his own Count without falling on the Title of the Defendant; and if the Plaintiff should join Issue on the Traverse in the Plea of Abatement, and traverse the Conusance also, it would be double, which would be bad upon fpecial Demurrer; and if the Plaintiff traversed the Conusance only, it would be a Discontinuance of the Plea in · Abatement.

But if a Justification for \* Damage Feasant had been pleaded in Bar, there the Caption and Detention according to the Form of the Writ is acknowledged; and therefore there the Plaintiff may traverse the Title of the Defendant, because the Defendant having

<sup>\*</sup> Doing Damage.

acknowledged the Caption and Detention according to the Form of the Count, he hath put himself on the Strength of his own Title. So in the Doct. Place Case of Time, if the Plaintiff in his 316. Count lay the Caption the 26th of March, and the Defendant pleads in Abatement, that he was possessed of the \* Locus in quo by Leafe determinable the 25th of March, and that he took the Beafts the 24th of March + Damage Feafant, | abjq; hoc that he took them the 26th; this is a good Plea in Abatement only, because it goes only to the Form of the Plaintiff's Count; for the Time here becomes necessary to be laid in this Action, because the Defendant may have a Right to take at one Time and not at another; but in this and every other Case in Abatement, where the Property is not disaffirmed to be in the Plaintiff, the Defendant must make Conusance of a just Cause of Return; for otherwise he doth not destroy the Force and Effect of the Writ, by

<sup>\*</sup> Place in which.

<sup>†</sup> Doing Damage.

Without that.

which the Deliverance was made, but leaves the Plaintiff a Right to retain his own Property.

## II. Of the General Isfue.

Bro. Abr. tit. Repl. pl. 5. Vent. 249.

The General Isfue in Replevin is non cepit; and here it is to be confidered that the Caption and Detention is only in Issue, and not the Property; and in this Replevin differs from Trefpass; for in Trespass where the General Issue is + non culp. the Defendant may on Evidence shew a Property in himfelf, because he cannot be guilty of Trespass in taking his own Goods; but in Replevin, upon \* non cepit, the Property by the Plea is admitted to be in the Plaintiff, and therefore is not in Question at all, but whether the Defendant took the Goods mentioned in the Declaration: and he cannot be admitted on the Issue to shew where the Property was, because he hath put it in Issue only before the Jury whether

<sup>\*</sup> He did not take them.

<sup>†</sup> Not guilty.

he took the Beasts or not, and not whose they were.

In Replevin for a Mare and Colt, Sid. 81, 82. the Defendant pleads \* non eft Culpa- Frail. bilis de Captione prædicta infra sex Annos ultimos elapsos; and the Plea was over-ruled, because it gives no Answer to the unjust Detention, which the Replevin complains of as well as the Caption, for the Caption may be just, and the Detention unlawful, as where the Defendant eloigns the Beafts, or drives them to a Castle, so that the Sheriff cannot replevy them at all, this is an unlawful Detention, however just the Caption might have been; and in the present Case it might be that the Colt was foaled in the Pound, and then was never taken by the Defendant, yet it may be unlawfully detained; and tho' he might not have taken it within fix Years, yet he might have detained it till the Day of the Purchasing the Writ, and that Detention is complained of by the Writ, and not barred by the Statute.

<sup>\*</sup> Is not guilty of the Caption aforefaid within fix Years last past,

III. Of the Justification.

See 2 Jones 25.

And there is some Difference between the Avowry and the Justification; for the Justification confesses the Caption and avoids the Injustice of it: The Avowry makes Title to such Caption of the Property of another: The confessing and avoiding the Caption may be \* quoad Damages only, the Avowry is always + pro Retorno Habendo.

Mod. Cal. 8t. 2 Lev. 92. Vent. 249. Bro. Abr. tit. Repl. pl. 3.

Property in the Plaintiff; as if the Defendant acknowledges the Caption and pleads Property in himfelf; this is a good Bar, because it confesses the Caption, which is the Gist of the Action, but avoids the Injustice thereof, by shewing that he had a Right to take them; and this not only will abate the Writ of the Plaintiff whereby the Deliverance was made, but also destroy all Right of Complaint for such Cap-

<sup>\*</sup> As to.

<sup>†</sup> To have a Return.

tion and Detention, and therefore goes in Bar of the Action, and consequently gives a Return without Conssance pro Retorno Habendo.

If the Defendant confesses the Cap- 2 Lev. 92. tion, and pleads Property in J. S. this Vent. 249. is in Bar of the Action as well as in Abatement of the Writ; for this not only shews that the Plaintiff had no Right to a Deliverance upon the Writ, but also that he has no Cause to complain of the Caption and Detention against his Pledges, which is in Bar of the Action, as this is not only a Justification to cover the Defendant from Damages, but for the Return of the Beafts, because he doth not admit Property in the Plaintiff, but disaffirms it, and therefore the Beafts ought to come back to the Defendant, because he ought to retain the Beasts against every one but 7. S. if erolered \*. de 20010.

2. As to Justifications that affirm Property in the Plaintiff; and these cover the Defendant from Damages

To have a Return.

only, because the Plaintiff is intitled to his Beafts, as having Property in them; and the Defendant in fuch Pleas not making Title to the Beafts as a Pledge to answer any Demand, he ought not to have the Beafts back, but may cover himself from the Damages only for the Caption.

Doct. Plac. 316. Ro. Abr. 319. Dany, Abr. 652.

-OLG SES

Thus if the Lord diffrains for Homage, and the Tenant dies, and his Executors fue Replevin: Here the Defendant may justify and cover the Damages, because the Diffress was rightly taken at first, tho' by the Death of his Tenant he can no longer retain it as a Pledge for his Homage, and therefore cannot be intitled to a Return, because the Homage was a Service to be performed by the Tenant in Person, and the Distress being to compel him to it, cannot be detained longer than his Life, and therefore the Lord must distrain the Heir \* de novo.

<sup>·</sup> Anew. next toaborate I arts revuo

IV. Of Avowries, and the Pleas thereunto.

Having thus considered the Replevin and the Writ that iffues upon proper Returns of the Sheriff, we come now to the Avowry.

The Avowry is the taking up the Defence of fuch Diftress, and it acknowledges the Diftress taken, but avoids the Injustice of the Caption complained of, and sets forth a good Cause for taking such Distress, in order to have it returned again to the Defendant; so that in Replevin both Parties are Actors, the Plaintiff to have Damages for the Taking and Detaining his Goods, and the Avowant to have Return of the Plaintiff's Beasts and Damages.

Avowries are either for Rents, Services, Heriots, &c. or for \* Damage Feafant; and here are to be confidered,

I. What is Substance, and what is Form.

<sup>\*</sup> Doing Damage.

II. The several Pleas to the Avowries; and herein of the feveral Tiaverses and Disclaimer.

What is Substance, and what Form in Avowries, and and an activated

At Common Law the Lord was

I wine thou confidered the Regievin

obliged to avow upon his real Tenant, which as the antient Law stood was eafily done, because the Tenant paid Fines on every Alienation, and the Alience was presented by the next Homage; but when these small Fines for Alienation were not gathered, nor the Courts regularly kept, the Lords were at a Loss to find their real Tenants, and confequently to know Stat. 33 H. 8. whom to avow upon. To Remedy this the Stat. 21 Hen. 8. c. 19. f. 3. was made; by this the Lord may distrain on the Lands holden of him, and avow as in Lands within his Fee or Seigniory, alledging in the faid Avewry the faid Lands to be holden of him without naming any certain Person or Tenant.

Seff. 1. c. 7. in Ireland.

eni I II

Upon

to be good where he names him bee

Upon this Act it hath been held, o Co. 22.2. that tho' the Words are, that if the Co.Lit.268.b. Lord distrain on the Lands holden of 156.b. him, yet if the Lord come to distrain, and the Tenant drive the Beasts which were once in View of the Lord off the Land, or out of the Seigniory, and the Lord pursues and distrains them out of his Fee, yet he may avow upon this Act, because the Distress in Construction of Law is taken upon the Land by Reason of the View and fresh Suit of the Lord.

In Avowry the Defendant said that Leon 301.

B. was seised of the Lands where, &c. Lucy v. Fishand held them of A. by Fealty and er.

Rent, and for Rent Arrear he made

Conusance as Bailiss to A. in Land held

of him according to the Statute; and

this was held a good Avowry upon the

Statute, tho it was objected, that having once named the Tenant in his

Avowry, the whole Avowry should

have been at Common Law, because

the Statute was made to establish the

Avowry without naming the Tenant at

all, and therefore it ought much more

N 2

to be good where he names him but once.

And. 159. Broker ry. Smith.

If A. holds of B. by Ront, as of his Manor of C. and A. conveys to the King, and the King grants it over to D. B. cannot for his Rent avow, as on Land held of him, because by A.'s Grant to the King the Tenure is destroyed, tho' the Rent remains, because the King cannot hold of a Subject; and therefore B. must avow according to the Nature and particular Circumstances of his Case,

Raft. Ent. Bro. Abr. tit. Avow. pl. 4. Hern's Plead. Co. Ent. 591,

In Avowries on the Statute, the Lord alledges that the Lands or \* Lacus in que are held of him by such Services, and avows as on Lands within his Fee or Seigniory, without naming 594,597,598. or avowing upon any certain Person or Tenant; this distinguishes it from the Avowry at Common Law, wherein the Tenant must be named; but in both Avowries the Lord alledges Seifin of the Services.

The Place in which.

In the Avowry at Common Law, the Lord fays 7. S. his very Tenant is feifed in Fee of the \* Locus in quo, and that he holds of him by Homage, Fealty and Rent, or fuch like, of which Service the Lord was feifed by the Hands of the faid Y. S. and because the Rent, &c. was Arrear, the Lord distrains and avows the Taking, and prays a Return; so that by this Avowry to make the Diftress lawful, the Lord must shew a Seisin of the Rent by the Hands of some certain Tenant; for the Lord's possessory Right is mentioned in no other Manner than by shewing that the Tenant that was in the actual Poffession of the Land did actually pay the Rent to the Lord, or to those under whom he derives; for if so, the Seisin of the Tenant of the Land, and of those claiming under him, continued for the Time of fuch Payment of the Rept to the Time of the Distress, is a Seisin in order to continue the Payment to the Lord, for out of the yearly Profits he ought to

The Place in which.

8 Co. 54. a.

have made the Payment demanded: and therefore it is not like the Cafe of Co.Lit. 298.b. any real Action, where they lay the Seifin within the Time of Limitation. and that they were dispossessed; for in fuch real Actions the Count supposes the Demandant is out of Poffession of the Thing to be recovered; but in the Avowry the Lord supposes his Seifin to continue 'till the very actual taking of this Distress, and therefore the Lord need not alledge his Seifin to be within forty Years, according to the Statute of Limitation, when the Lord supposes himself still seised even at the very Day of the Avowry, and that this Diffress is the very Collection of the Rent of which he is in Possession; and if he were not in Possession the Distress would be unlawful, for if the Lord had a Right to the Services, yet if he was not actually feifed of them, he must be put to his Writ of Customs and Services, before he can continue the Seisin of the Services, in order to recover them in this possessory Acout of the yearly Firsh a he o , nois

de M

nodW he Place in which.

for from whom he claims was felfed When the Tenant comes in if he do not disclaim, or plead # Hors de fon Fee, (of which hereafter) he must admit that he is seised of the Estate; but he may deny that he holds that Estate of the Lord by such Services, which is a Traverse of the Tenure, or he may traverse the Seisin of the Services by that particular Hand by which the Lord in his Avowry alledges himfelf to be seised, because if that Seisin be destroyed, which is the Seisin from whence the Lord continues his own Possession to the Time of the new Caption, there is an Interruption of the Seifin of the Lord, and of his Title in this poffeffory Action; and therefore if that Seifin be found against the Lord, he cannot recover in Replevin, because he is out of Possession, but is driven to his Writ of Customs and Services in order to recover the Seifin, sture 3 and

If the Lord avows for Rent on a Doct. Plac. Gift in Tail, or Leafe for Life or Years, Bro. Abr. tit.. there the Lord lays that he or the Per- Avow. pl. 52.

pleaded in B.r. because the Words a

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<sup>\*</sup> Out of his Fee.

fon from whom he claims was seised in Fee of the Land itself, and that he or such Person made such Demise or Gift; and by this Method the Lord continues his Right to seize the Distress.

attended the Logic and Call Sension

And here plainly the Lord continues his Seisin to the very Time of the Distress, because his Tenant was seised of the very Land itself, in order to raise such Rent, and pay it to him by the original Stipulation, and therefore the Seisin of the Tenant was all along the Seisin of the Lord, and maintains his Possession in order to take Pledges for his Rent.

But if such Gift in Tail, or Lease for Life or Years, were made before the Statute of Limitations, and there had been no Seisin continued, there the Statute of Limitations may be pleaded in Bar, because the Words and Intention of that Statute are to bar such antient Rights, where the Lord had not actual Seisin within the forty Years.

If a Man makes a Grant of a Rent- 8 Co. 65. Charge, there the Seisin of Estate is Doct. Plac. laid in the Tenant of the Land, and it 317, 318. Is the Deed that gives him Seisin of 170. such Rent, or the Power to get it; and there if the Tenant cannot deny the Deed, if the Commencement of it be within the Act of Limitation, the Grantee's Power of distraining will thereby appear, and his Right to continue the Possession under that Deed.

And if any other actual Seisin had been required by the Law in Cases of Leafes, Gifts in Tail, or Rent-Charges, the Lord would have no compulfory Means to acquire fuch Rent at first without the Tenant's voluntary Payment, which had been to elude fuch Leafes, Gifts and Deeds; and therefore the Statute of Limitations does not extend to fuch Leases, Gifts or Deeds of Rent-Charge, where the Law before the Statute required no Seifin at all necessary to be alledged in the Avowry, fince, as is faid, the Lord and Grantee continue the Possession of such Rents without actual Seifin, and the Statute

hath not altered the Law in that Par-

Course their a Serie of Private

If A. be possessed of a Term of Years, rendering Rent, and distrains the Beasts of a Stranger for an Arrear of this Rent, it is not sufficient for A. in his Avowry to say generally \* quod possessed fuit of the † Locus in quo, because A. having taken the Beasts of a Stranger, he must shew by what Title he took them; and this cannot be done without alledging a Seisin in Fee in his Lessor, in order to shew a Right in himself to distrain.

If A. Lessee for Years, lets for Years to B. by Deed indented, and distrains B. for Rent, it is sufficient for him in his Avowry to say \* quod possessionatus fuit, and leased to B. by Deed indented, for then B. will be estopped to controvert A's Title to the Land during the Lease, tho' B. had taken a Lease of his own Land from A. but if the Lease were by Parol,

Lev. 146.

That he was possessed. laufac laws w

<sup>+</sup> Place in which.

a.Mod. 141.

Canta. o. 2 bloc, vo.

Same org.

To wood

1.00

then it seems he must alledge the Seisin in Fee, because taking the Property of another, and there being no Estoppel in the Case, whereby the Plaintiff in Replevin cannot controvert the Right of A. to the Land, it feems that A. must fhew a Right, or else he cannot maintain the Taking of another's Property \*.

Ιf

\* The Irish Stat. of 9 Geo. 2. c. 13. fect. 4. reciting that the Remedy for recovering Arrears of Rent, by taking a Distress upon the Lands chargeable therewith, is tedious and difficult, by Reason of the Avowant being obliged in his Avowry to deduce the Title to the Lands from him who was seised in Fee, and to produce Deeds that no way belong to him, enacts, That where any Diffress or Diffresses shall be taken by any Landlord or Leffor for any Arrears of Rent then due, or that shall thereafter become due, upon any Lease for Lives or Years, or upon any Contract or Writing, purporting a Demise of any Lands, &c. whereon any Rent has been paid by the Tenant who shall be in Possession of the Land at the Time of such Distress taken, or by any Person under whom such Tenant claims, where the Title to the Lands is not in Question, and a Replevin is taken or issued for such Distress, it shall and may be lawful for any Avowant, in his Avowry, to fet forth only that he was feifed or possessed, without setting forth the Commencement of his Estate, or deducing a Title from the Person under whom he derives his Interest, or that such Person was seised in Fee of the said Lands,

decide forms he must ailedge the Seifin 2 Lutw. 1492. If a Termor diffrains the Beafts of Ball v. Garanother \* Damage Feafant, and the lick. Owner of the Beafts brings his Action 3 Mod. 132. of Trespais or Replevin, it is not suf-Carth. 9. 2 Mod. 70. ficient for the Termor in his Justificacontra. See Fort 256. tion or Avowry to fay + quod pof-Salk. 643. (effionatus fuit generally, because where Lucas 37.

&c. and that the Want thereof shall not be any

Caufe of Demurrer to fuch Avowry.

The Irish Stat. 25 Geo. 2. c. 13. f. 4. taken from the English Stat. 11 Geo. 2. c. 19. f. 22. reciting that feveral Lands, Tenements and Hereditaments, are enjoyed under Articles, Minutes and Contracts in Writing, whereby the Rent payable for the same is ascertained, but the said Articles, Minutes or Contracts, do not contain an actual Demife; and that Avouries or Conusances upon Distresses for Rent could not be made, as the Law then flood, upon such Articles, Minutes or Contracts, and that other Difficulties often arise in making Avowries or Conufance upon Distresses for Rent, not Sufficiently remedied by the Laws heretofore made, enacts, That it shall be lawful to and for all Defendants in Replevin, to avow or make Conusance generally, that the Plaintiff in Replevin, or other Tenant of the Lands, &c. whereon fuch Diffress was made, enjoyed the same under a Grant or Demise, or Article, Minute

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<sup>\*</sup> Doing Damage.

<sup>+</sup> That he was poffeffed.

the Termor takes the Beasts themselves for the Damages, he must set forth by what Right or Title he took them, for he cannot seize another's Beasts for any Damages done to that which doth not appear to be his rightful Possession or Property; and therefore the Termor to justify this Caption in Trespass, or in his Avowry, where the Proprietor seeks a Restitution of his Beasts by Replevin, must alledge the Seisin in Fee in his Lessor, and so derive a Title to himself.

But if the Avowant for \* Damage Raft. Ent.

Feafant alledges the + Locus in quo to 561. b.

Clift's Ent.

be his || folum & Liberum Tenementum, 564.

that is sufficient without alledging the Owen 51.

Dyer 171. b.

Brown's Ent.

Minute or Contract in Writing at such a certain 304.

Rent, during the Time wherein the Rent so L.Raym.333 distrained for incurred, which Rent was then, and still remains due, without further setting forth the Grant, Tenure or Demise, or Title of such Landlord, Lessor or Owner of such Lands.

& c. and it shall be no Objection to any such Article, Minute or Contract, that the same doth not contain an actual Demise.

<sup>\*</sup> Doing Damage.

<sup>+</sup> The Place wherein.

Land and Freehold.

Seifin in Fee, for the Quantity of the Estate is not material where the Avowet ant possesses \* Jure proprio for he hath thewn enough to entitle him to the Caption, if the + Locus in quo be his | Liberum Tenementum; but the Leffee that possesses 1 Nomine alieno hath no more than a precarious Poffeffion, which is either good or bad according to the Estate of him in whose Right he possesses; and therefore if he doth not thew an Estate to entitle himfelf to the Caption, he doth not shew any Right to take them at all, for it the covers the Right only to fliew a Term, and not a Freehold out of which it is derived; it is only the Freeholder, or his Bailiff or Person deriving under him, that hath Authority to take another Man's Beafts upon the Soil, for a Stranger that is no Bailiff of the Freeholder is a Trespasser if he doth it, and therefore if a Person doth not thew in his Avowry that he doth it in his own Right, or by whose Right he olicio di lauße ne me me no ton

In his own Right.

<sup>+</sup> The Place wherein.

<sup>#</sup> Freehold.

The Fisce wherem. In another's Name bodger bas bas ! doth. Sertin

doth, he shews no Right at all to take such Distress.

But if the Termor instead of taking the Beasts into his own Hands for a Compensation of Damages, shall recur to the Law to have amends by Action of Trespass, \* quare Clausum fregit, since here he comes to the Law only for a Compensation for the Damages done to his Possession, he hath nothing to do but to shew his Possession, unless the Defendant shew a Right to the Land itself.

If the Grantee of a Rent-Charge Clift 642. avows for his Rent, he must also al-Hob. 28. Bro. Abr. tit. ledge a Seisin in Fee-simple in his Avow. pl. 88, Grantor of the Lands out of which 164. the Rent issues; for this being a Rent not arising from any Tenure, doth not turn on the Rule that governs the seudal Services; but the Reason is, that the Avowry being in the Nature of a Declaration, the Avowant, as all other Plaintiffs in other Actions, ought to shew to the Court, that what he

<sup>\*</sup> Wherefore he broke the Close.

fues for is subsisting, and this he doth not do unless he alledges a Seisin in Fee in the Grantor; for if the Rent-Charge was granted in Fee by a Person who is only Tenant for Life, the Grant determines by his Death; and therefore the Grantee ought to shew to the Court, that his Grant has still a Continuance, which is best done by alledging a Seisin in Fee in the Grantor, and this Seisin in Fee in the Grantor is traversable.

Salk. 562.

If Tenant in Fee leases for Years, rendring Rent, and brings an Action of Debt for the Arrear of Rent, he need not alledge any Seisin in Fee in his Declaration, because the Action of Debt arises from the Contract of the Parties, and was not substituted by the feudal Law in the Place of Forseiture; and therefore in Debt for Rent, the Lessor only declares \* quod cum demistic fuch Lands to A. for such a Term, rendring such certain Rents, by Virtue of which Demise A. entered, &c.

<sup>\*</sup> That whereas he demised.

But where in Debt for Rent the Clift 225. Plaintiff sues as Assignee of the Reverfion and Rent, it feems by the Precedent that he must alledge a Seifin in Fee in the Lesfor, because fince the Plaintiff did not demise himself, he must shew who did, and that the Reversion came by such Assignment to him, in order to make his Title to the Action: for it feems abfurd that the Plaintiff should say that the first Leffor granted the Reversion to him. without first shewing that he had it in himself; and hence it should seem to be necessary even in Debt for Rent, to alledge in this Case a Seifin in Fee in the first Lesfor, for he doth not come in as a Representative of the Contractor. but as Affignee of the Reversion; and therefore must shew the particular Estate of the Reversion.

In Avowries there must be always a Sid. 10, 20. Place certain mentioned where the Hob. 16. Caption was, for the Avowant must admit the Caption to be in the Place mentioned in the Declaration, in order to shew the Cause of taking it there; for if the Avowant should lay the O 2 Taking

## The Law of REPLEVINS.

Taking in another Place than the Plaintiff hath done without traverfing the Place mentioned in the Declaration, this would be altogether bad, because the Avowant neither confesses and avoids, nor traverses the Declaration, and therefore such Plea is nugatory, and not to the Purpose.

Danv. 653. Cro. Jac. 372. Wheadon v. Sugg.

Where a Man avows in his own Right, the Form is \* quod bene advocat Captionem & juste, &c. where he makes Conusance in Right of another, he says + bene Cognovit Captionem, &c. but tho' this be the regular Form, yet it hath been held upon Demurrer, that where the Defendant avowed in his own Right by + bene Cognovit Captionem, &c. it was well enough, because the Avowry is a Confession of the Caption, which both the Words Advocat and Cognovit do confess, and avoids the Injustice of such Caption for the Reasons mentioned in the Avowry.

<sup>\*</sup> That he well avows the Taking, and just-

<sup>+</sup> He well makes Conusance of the Taking, &c.

Avows and makes Conusance of.

If the Defendant avows for Rent Dalison sin. being in Arrear at Michaelmas, \* & Benl. 72.

Tempore Captionis, this is good, tho Cro. Jac. 283. he doth not say, † quod adhuc aretro existit; for the Avowant avoids the Injustice of the Caption, if he shews that the Rent was in Arrear at the Time he took the Beasts, nor is he obliged to say † quod adhuc aretro existit, to excuse himself from an unlawful Detention, because after the Beasts are once impounded, no subsequent Tender or Payment can make the Detention unlawful in this Action.

In an Avowry by Husband and Wise Cro. Jac. 283. in Right of his Wise for Arrears of a Bowles v. Rent-Charge incurred before the Cover-Bust. 139. ture, the Avowry concludes, and be-S. C. cause at Michaelmas, &c. 201. was in Arrear and not paid to the Husband and Wise, he distrained and avows, &c. and it was objected, that by his own shewing the Arrears were not due to himself and his Wise, and therefore

<sup>\*</sup> And at the Time of the Taking.

<sup>+</sup> That it is still behind.

the Avowry ill; but the Objection was over-ruled, because if he had said, for 201. Arrear he distrained, that had been good, and the Rest was held Surplusage.

Hob. 208.

If one avows as Administrator for Arrears of a Rent-Charge, where he may claim the Arrears in his own Right, and it appears that the Avowry is not so framed as to entitle him to the Arrears as Administrator, yet the Avowry is good, because where there are two Titles fet forth in the Avowry, and only one sufficiently alledged, that one Title only gives him as good a Right to the Rent as both, and therefore he ought to recover, and the Ayowry as Administrator shall be Surplusage; as if a Rent-Charge be granted to the Husband and Wife during the Life of the Wife, and the Husband dies, and the Wife avows as Administratrix to her Husband where she might avow \* Jure Proprio, yet she having a Title to it in her own Right by the Grant, the Avowry is good.

id. It add to ame i adt

<sup>\*</sup> In her own Right.

If a Man avows for an entire Rent, Saund. 282, where it appears that he hath Title 284. Duppa v. only to a Moiety of it, the Avowant Mayo, &c. cannot recover, because he hath not Cro. Eliz. 340. avowed according to the Circumstances 637, 651. of his Case, and therefore cannot make Cro. Car. 154. out his Title as he hath laid it. For suppose A. and B. were Jointenants of Raft. Entr. a Rent, and A. distrains and avows for 565. a. the Whole, this Avowry is bad; for if Ro. Abr. 320. it should stand, and A. should recover Carth. 328. his Moiety, then there must be two Suits for one joint demand, which would be vexatious and abfurd; and in this Case the Avowry and Action of Debt stand on the same Reason, and agree.

So likewise Caparceners must join Salk. 390. in Avowry; therefore if one Jointenant Carth. 364. or Caparcener distrains alone, he must avow in his own Right and as Bailiss to the other.

If in the Avowry the Lessor avows Cro. Car. 104, for only Part of an half Year's Rent Cro. Jac. 498. that is due, and doth not shew that 4 Mod. 402. the Residue is satisfied, such Avowry is ill, because where a certain Rent is O 4 due

due it must be demanded at once, for if Part only should be demanded, and the Residue not appear by the Avowry to be satisfied, and the Avowant should recover that Part which he demands, he may then multiply Suits by suing for Part of his Rent at one Time and Part at another, which is against Reafon, and the End and Policy of the Law; and in this also the Avowry and Action of Debt for Rent agree.

Cro. Eliz. 547. Miles v. Willoughby.

If Executors avow on the 32 H. 8. c. 37. for the Arrears of a Rent in Fee granted to the Testator, they must shew that the Lands liable to the Rent-Charge continue in the Hands of the Tenant or Purchaser in whose Time the Rent sued for incurred, because this Remedy being given by the Statute, the Method prescribed by the Statute must be observed.

2 Mod. 4, 5.

In an Avowry for a Heriot, the Avowant as Bailiff to J. S. \* bene Cognovit Captionem Averiorum prædicto-

<sup>\*</sup> Well makes Conusance of the Taking of the aforesaid Beasts in the Place aforesaid.

\* Tempore quo, &c. and yet held good, because the acknowledging the Caption as set forth in the Declaration, admits it to be at the Time laid there.

If two Tenants in Common distrain Lit. Sect. 317. for Rent, they must make several A-b. Co. Lit. 198. vowries, because they claim the Rent Cro Eliz. 530. and Reversion by different Titles, and therefore must severally set them forth in distinct Avowries.

If two Persons distrain an Ox, or 5 Co. 19. 2. an Horse, and are obliged to make 38. b. different Avowries, both Avowries must abate, because if both should shew Cause to have Return, the Court could not give Judgment for both, and therefore neither can have it.

In an Avowry for Heriots, you can-Hutton 4. not avow for a Heriot generally, but Hob. 176. you must avow for the best Beast or the two best Beasts of the Tenant, as the Case is, for otherwise the Plaintiff would be ousted of his Replication that the Tenants left no Beasts.

<sup>\*</sup> At the Time when, &c.

salisto Lace without their

V

II. Of the feveral Pleas to Avowries.

Tho' the Avowant may now by the Statute avow as in Lands holden of him and within his Fee and Seigniory, yet it is provided by the faid Act, that the Plaintiffs and Defendants in Writs of Replevin and fecond Deliverance shall have like Pleas and like Aid Prayers in all fuch Avowries. Conusances and Justifications, as they might have had before, and as tho' the faid Avowry, Conusance or Justification had been made after the due Order of the Common Law, (Pleas of Disclaimer only excepted.) For this Reason, and becanse the Lord is still left to his Avowry according to the Common Law, it will be necessary to consider the several Answers and Pleas that at Common Law might have been made to the Avowry; and herein,

- 1, Of the Disclaimer.
- 2. Of the Plea \* Hors de fon Fee.

<sup>\*</sup> Out of his Fee.

- 3. In what Cases the Tenure was traversable,
- 4. In what Cases the Seisin of the Services was traversable.

## 1. Of the Disclaimer.

And here it is to be observed, that Raft Ent. 224, at Common Law the Avowry was al- 225. ways upon some certain Person, and if Doct. Plac. foch Person claimed or pretended no Co. Lit. 1022. Right to the Tenancy, he might have 268. b. disclaimed. By such Disclaimer he denied to hold the Tenancy of the Land at all; it was a Renunciation of his Homage and Fealty, and that he would not hold of the Lord upon any Terms; and therefore the Lord on fuch Disclaimer was intitled to the Restitution of the Land itself, which was originally given for the Services avowed for, and in order to bring back the Land itself, the Lord had a Writ of Right fetting forth the Proceedings in the Replevin, and fuch Disclaimer; and hence we may fee the Reason why there could be no Disclaimer to any Avowry on the Statute of H. 8. because

cause the Avowry on the Act is not on any Person certain, but on Lands within the Lord's Fee and Seigniory, and therefore whoever takes up the Desence to such Avowry must be only a Person concerned in the Tenancy, because if an entire Stranger should take up the Desence, and be allowed to disclaim, the Lord could not have Return of his Distress, but must take his Writ of Right for the Lands themselves; and in the Prosecution of that Writ he could not prevail, because the rightful Tenant would appear to bar him, and so the Lord be disappointed both Ways.

Doct. Plac.

But a Disclaimer cannot be where a Man levies a Fine of a Seigniory, and the Conusee brings a per quæ Servitia to have the Attornment of the Tenant, because the Lord will not be entitled to the Services, or to the Land itself in Case of a Disclaimer, until he hath Possession of such Services by Attornment; and therefore the Tenant in the quæ Servitia shall not disclaim, because the Lord upon such Disclaimer cannot have a Right to the Land itself; but whenever the Lord is in Possession of the Seigniory, and pursues his Right

for the Services by Replevin, Cessavit, or the like, there the Tenant may disclaim, because the Lord on such Disclaimer shall have the Land itself, which was originally given for such Services.

But here it is to be noted, that the Doct. Plac. Tenant must be a Person capable of 132. the Act of Disclaimer, because if he be an Infant, such Disclaimer shall not turn to his Prejudice by Reason of his Indiscretion.

So where the Tenant is seised of Doct. Place the Lands in Right of another, in or-131, 132, der to preserve such Right; and therefore the Disclaimer of the Abbot shall not hurt the Church, nor of the Husband the Wise, because they are intrusted by Law to defend the Right of the Tenancy, and not to destroy it.

If there be a Lord, Mesne and Te-Doc. Place, nant, and the Mesne disclaim the Right 133. of the Mesnalty, the Mesnalty is extinct, and the Tenant holds of the superior Lord as the Mesne held over; for here by such Disclaimer the Lord cannot have Possession of the Land, because

because the Tenant's Interest therein by the Disclaimer of another cannot be hurt; but the Lord comes nearer the Tenancy by such Disclaimer, because if the Tenant dies without Heirs, the Escheat of the Lands is immediately to the Lord and not to the Mesne.

Doct. Plac. 133. Co.Lit.362.a.

In a Formedon, which the Statute De Donis hath given to recover the Lands and not Damages, if the Tenant disclaim, the Demandant shall recover the Land itself immediately; but in an Affise and Writ of Entry, where the Demandant feeks Damages as well as the Land, it is not enough for the Tenant to disclaim, because then every Diffeifor, when the Action is brought against him, would disclaim, in order to screen himself from Damages; but the Demandant, notwithstanding such Disclaimer, may aver that he was Tenant of the Land in order to have his Damages.

Doct. Plac.

If a Pracipe be brought against two, and one disclaim, the whole Frank-tenement vests in the other; but if one pleads Non-tenure, the Whole does not vest in the other, because the

the other be not seised of them, yet a Right may remain in him, and his pleading that he doth not hold the Lands, doth not vest the Right in ano-

If one disclaims, and the other pleads Doct. Plac. Non-tenure, the Demandant may en- 134. ter into the Whole, because by the Disclaimer of one, the Tenancy shall not vest in the other that hath no Seisin against his own Plea of Non-tenure, and therefore the Demandant's Right of Entry is open to him.

If a Pracipe be brought against two, Doct. Place and one makes Default after Default, and the other disclaims, the Demandant shall recover the Whole, because the Default bars one and the Disclaimer the other.

2. Of the Plea of \* Hors de son Fee.

As the Tenant may disclaim, so he Rast. Ent. 566. may plead + extra Peodum, and fuch b. See the

<sup>\*</sup> Out of his Fee.

<sup>†</sup> Out of his Fee.

Plea doth not amount to a Disclaimer. for if they should construe the Plea of \* extra Feodum to amount to a Difclaimer in all Cases, then those Tenants that were Boundaries of Manors would be exceedingly harraffed by the neighbouring Lords; and therefore as the Tenant might disclaim, which is an entire Renunciation to hold of the Lord, and whereby the Tenant difclaims to pay those Services as the Price of the Land itself, so he may plead \* Hors de son Fee, which is taking upon him the State of the Land, and acknowledging to hold by fuch Services if he be within the Seigniory of the Lord; for in this Plea he doth not renounce the Services (for that is the Plea of Disclaimer), but he takes up the Land under the Services the Lord demands of him, and owns them as the Price of the Land in Case the Lord be entitled to fuch Services; and therefore the Tenant may plead + extra Feodum as well as disclaim in Replevin, because he may shew that he is willing

<sup>\*</sup> Out of his Fee.

<sup>†</sup> Out of his Fee.

to hold by fuch Services in Case the Lord be entitled thereunto.

If the Lord brings a Writ of Mort-Doct. Place dauncestor for his Services, the Tenant 216. cannot plead \* Hors de son Fee, because there the Lord makes Title in his Writ, and the Tenant must answer to the Title set out in the Writ, and therefore he cannot plead generally out of his Fee, for that doth not answer the Title in the Writ, but he must plead that the Plantiss's Ancestor did not die seised, which goes to the Title in the Writ.

If the Lord in Replevin do not Doct. Place avow upon his very Tenant but upon a 216, 217. Stranger, such Stranger when he comes in may plead that he himself is \* extra Feedum; for having never held of the Lord, the Lord cannot maintain his Avowry, for the Lord cannot say that he held of him, if the Tenant never was in his Homage, this Plea of \* Hors de son Fee is the only Plea that a mere

Out of his Fee.

Stranger to the Avowry, yet made Party by \* Aid Prayer, may plead in Abatement of the Avowry.

But to explain this Matter fully, we Co. Lit. 268. must consider the antient Avowry of the Lord upon Diffeisins committed; and on fuch Diffeifin the Diffeifor did not become Tenant to the Lord (not even if the Lord had accepted Rent of him) so as to prevent the Disseisee from compelling the Lord to avow on him, tho' by fuch Acceptance of Rent the Diffeifor was stopped to fay he was not his Tenant, and the Lord + quoad him was also estopped from saying that he was not his Lord; so that if the Diffeisee died without Heirs, the Lord could not enter into the Tenancy, having already by his own Acceptance of the Rent admitted the Land to be full of another; but between the Lord and Disseise there was no Estoppel at all, because the Diffeifin being a tortious Act, if the Lord did collude with such Disseisor, that should be no Prejudice

<sup>\*</sup> Prayer in Aid.

<sup>†</sup> As to.

to the Disseise: and it was often usual on fuch Diffeifins for the Lord to obtain more Rents from fuch Diffeifors. and when the Diffeifee came to take Possession and put in his Beast, the Lord would diffrain the Beafts of the Diffeisee, and avow on the Diffeisor for the Rents that he had accepted from him; now on such Avowry of the Lord it was a dangerous Plea for the Diffeisee to say that the Diffeisor was out of the Fee of the Lord, because the Acceptance of such Rents and Services from the Diffeifor brought him within the Lord's Fee; and therefore the Diffeise was compelled to shew the Special Matter, that he was very Tenant to the Lord, that he had 9 Co. 21. 27 paid the Services (or tendered them) that were due, and that the Lord ought to avow on him, which was in Abatement of the Lord's Avowry, because it destroyed that Avowry upon his Beafts for the Services which the Lord had accepted from the Diffeifor, and compelled the Lord to avow the Caption of his Beafts for the Tenure that was really due from the Diffeisee to the Lord; but as an Inducement to P 2 this

### The Law of REPLEVINS.

this he was obliged to shew that the Rent was tendered, or not in Arrear, that the Injury might appear on the Lord's Side, and that he did not accept of another for want of Payment from him; and as the Diffeisee might have entered himself and put in his Beafts, so he might have let to another who might likewise put in his Beasts, and then if the Lord had avowed upon the Diffeisor, such Lessee might have shewn that there was a very Tenant, the Diffeisee who had paid or tendered the Rent to the Lord, and had made a Lease to him who put in his Beasts which were distrained; for the Lessee, who kept Possession for the Disseisee, had the fame Privilege that the Diffeisee himself had to plead this Special Matter, because he should not be liable to the Services unjustly accepted from fuch Diffeisor, and he had a Right to pray in Aid of such Disseisee, that the Diffeisee who had the Title Deeds of the Land might be brought in to make out his Right, or if he fail, that the Lessee might have the Writ \* de

To quiet his Pledges.

Plegiis acquietandis against such Les-

So it is if the very Tenant in Posses- 9 Co. 20. fion made a Lease to A. for Years, and the Lord had distrained A, and avowed upon a mere Stranger, A. might upon Special Matter have prayed in Aid of the Lessor, and by that Means have brought him in to defend the Tenancy from the Distress of the Lord, by compelling the Lord to avow upon the Lessor; for A. being only a Termor cannot plead the Payment of the Rent and Services without his Leffor, who is the very Tenant, and when the Leffor is brought in, if the Services are really done, that abates the Lord's Avowry; if they are not performed, the Lord shall have Return of his Pledges, but then A. hath Remedy over against his Lessor by Writ \* de Plegiis acquietandis.

But if the Disseisor had died seised, Co.Lit. 268.2. and the Lord had accepted Rent from the Heir of the Disseisor who came in

<sup>\*</sup> To quiet the Pledges.

by Title, the Lord was obliged to avow on such Heir, and the Entry of the Disseise, or the Right of putting in his Beasts, or demissing to his Tenants, was taken away, and then the Disseise was not very Tenant, nor could he compel the Lord to avow upon him 'till he recovered his Right in the real Action. My Lord Coke says, the Feossee of the Disseisor is in same Condition with the Heir: But Qu. of this, unless it be in antient Times, when a Feossem was construed to toll an Entry as well as a Descent.

When the Lord avows upon a Stranger, and takes the Beasts of a Stranger, who is neither very Tenant nor Lessee of the very Tenant, such Stranger can plead nothing but \* Hors de son Fee, because he hath nothing to do with the Right of Rent, since the Avowry is not on the very Tenant; but such Stranger may disengage himself by the Plea of \* Hors de son Fee, because the Lord hath not shewn just

<sup>\*</sup> Out of his Fee.

Cause of Caption of such Beasts, if he hath not maintained his Avowry by proving such Services are due from the Person he avowed on.

## 3. When the Tenure is traversable.

And this is when the Tenant doth 9 Co. 33,359. not entirely withdraw himself out of Bucknal's the Homage of the Lord, but doth not Cro. Eliz. 799. admit the fame Sort of Services as the Lord hath avowed for; as if the Lord avows for Fealty, Rent, and Suit of Court, and alledges Seifin of all, if the Services were really but Fealty and Rent, the Tenant in such Case may traverse the Tenure, that is, he may admit that he holds by Fealty and Rent, and as to the Rent that there is nothing in Arrear, and traverse the Tenure with an \* abfque boc that the Tenancy was held by Fealty, Rent and Suit of Court, + modo & forma pradieta, &c. and in this Case tho' the Avowry had been only for Rent Arrear, yet if the Tenure thus traversed be

<sup>\*</sup> Without that.

<sup>+</sup> In the Manner and Form aforefaid.

found against the Lord, he shall not have Return, because the Point in Issue is found against him; the Reason is because the Tenure is the Lord's Title. and the Lord must set forth his Title as it really is, and therefore if it be by Knights Service, he must set forth by Knights Service; if it be by Fealty only, he must set it forth so; if it be by Fealty and Rent, he must set forth in that Manner; and if the Lord fails in making out the Title he hath fet forth, there is an End of the Lord's Avowry, because he doth not prove the Title he hath alledged; but if the Lord fets out a Title by 10 s. Rent, the Tenant cannot fay that he holds by 5 s. \* absque boc that he holds by 10 s. because the Tenant holds by Rent-Service, whether more or less, and the Quantum of the Rent doth not alter the Nature of the Service, whether it be less or more; and after the Statute of Quia Emptores the Services were subdivided, but the Tenure remained the same; and therefore it would have been a dangerous Thing after the Statute, when the Services

Without that.

were fubdivided and apportioned by the Alienation of the Tenant, to have suffered the Tenant to have traversed the Quantity of the Services which were more or less according to his Share of the Land; but they allowed him to traverse the Seisin, as is said hereafter, because the Lord could not recover more of him in Replevin than the Services of which he was feifed.

But the whole Tenure is not tra- 9 Co. 35. a. versable; as in the aforesaid Case, the Doct. Plac. Tenant cannot plead that he holds the Tenancy of a Stranger by fuch Services, \* abjq; boc that he holds them of the Avowant, because by such Plea the Tenant withdraws himself entirely from the Homage of the Lord, and where he does that, his proper Plea is a Disclaimer or + Hors de son Fee.

4. Where the Seisin is traversable.

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And this is where the Tenant doth 9 Co. 33. not only take the Estate of the Land

<sup>\*</sup> Without that.

<sup>†</sup> Out of his Fee.

upon him, but admits also the Toure by the same Sort of Services, and disagrees with the Lord only in the Quantity; as if the Lord avows for 10 s. Rent, where the original Refervation was only of 5s. and the Lord had obtained the Seisin of the 10 s. by Coertion of Diffress, the Tenant may traverse such Seisin, and thereby avoid fuch Encroachment in the Avowry; for the Tenant in this Case cannot plead \* Hors de son Fee, because he is plainly within the Homage of the Lord, nor can he traverse the Tenure, because that is by the same Sort of Services as are avowed for; but he may traverse such Seisin of such encroached Services, because what the Lord hath obtained by Coertion and Force, can be no Foundation to ground a Right upon; but if fuch Seifin of the 10 s. Rent had been obtained by the voluntary Payment of the Tenant, he cannot traverse such Seisin, nor avoid the Payment of fuch enroached Rent in the Action of Replevin, for the Tenant cannot traverse the Tenure for the

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<sup>\*</sup> Out of his Fee.

former Reason, nor the Seifin, because that Issue must be against him, in Regard the Case supposes the Lord to be actually seifed by his voluntary Payment, and therefore where the single Issue is whether the Lord is seifed or not, it must be against the Tenant in his possessory Action.

But the Tenant may avoid such encroached Rent by ne Injuste vexes, because that is a Writ of Right where the mere Right to such Services may be controverted, and consequently the bare Seisin of the Services will not avail the Lord, unless they were originally reserved; for when the bare Right to the Rent is in Question, there can be no Reason to compel the Tenant to pay that for ever, which he once paid the voluntarily in his own Wrong; so it is in a Cessavit brought by the Lord, because the mere Right to the Services is controverted in it.

If the Tenant instead of string a 9 Co. 34. 2. Replevin for the Distress taken by the Doct. Plac. Lord for those encroached Services 318. brings an Action of Trespass against the Lord, there the Seisin shall not conclude

clude the Tenant; so in an Assiste or Writ of Rescous brought by the Lord, because if the Lord hath really no Right to the encroached Services, the Lord is punishable as a Trespasser for taking the Tenant's Beasts, and when there is no just Cause of Caption the Tenant may rescue; and if the Lord bring a Writ of Rescous, the mere Right to the Services will come in Question; and if that appear against the Lord, the Tenant hath a Right to rescue the Beasts distrained.

But even the Traverse of the Seisin in the Avowry is to be understood with these Restrictions.

Doct. Plac. 318. For 1. The Issue in Tail may traverse the Seisin of Services of the same Nature, tho' the Lord had obtained such Seisin by the voluntary Payment of the Donee in Tail, because the Donee during the Continuance of the Intail cannot charge or incumber the Lands intailed so as to bind or affect the Issue; and for the same Reason the Successor of a Bishop or Prior shall traverse the Seisin of the encroached

Rent given by the voluntary Payment of their Predecessors.

- 2. So the very Tenant shall traverse 9 Co. 34. 2. such Seisin if he hath a Deed to shew Doct. Plac. by which the Services were reserved, for the Deed destroys that Title which the Seisin of the Services gave the Lord, if these Services appear not to have originally been reserved.
- 3. The Seisin of Services by In-9 Co. 34. Le croachment is not material where there is no Tenure, because where there is no Tenure the Tenant may plead \* Hors de son Fee, and so discharge himself from all Services.
- 4. If the Seisin was not within the 9 Co. 34. In Statute of Limitations, the Tenant may plead the Statute to defeat the Seisin of the Lord before the Statute of Limitation, for this is a Statute Bar to quiet Mens Possessing against stale Demands; but the Tenant in such Plea must acknowledge the Tenure to give the Lord a Writ of Customs and Services,

<sup>\*</sup> Out of his Fee.

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which being an Action of an higher Nature, hath longer Time of Limitation allowed to it than a possession.

Doct. Plee. 132. 9 Co. 34. b. plead \* ne unq; Seihe de Services generally, because this amounts to a Traverse of the Tenure, since if a Man had never been seised of an immemorial Service, he can have no Right to it; and in such a Case the Tenure ought to have been traversed, which stands confessed in this Plea, since he hath not traversed † quod non Tenuit.

g Co. 35. 2.

only of Services for which the Avowry is made, except a Seifin be alledged of Services of a higher Nature, which include those in the Avowry; as if the Tenure be by Homage, Fealty, Rent, and a Pound of Pepper, and the Lord alledges a Seisin of all, and avows only for the Pound of Pepper, the Tenant cannot traverse the Seisin of the Rent, because it is not material whether the

<sup>\*</sup> Never feifed of Services.

<sup>†</sup> That he did not hold it.

Lord was seised of the Rent or not to make out his Demand for the Pound of Pepper; but if the Tenure be by Homage, Escuage and Rent, and he alledges Seisin of all, and avows for Homage which is included in Escuage, there by traversing the Seisin of the Escuage you traverse the Seisin of the Homage, which the Lord demands in his Avowry.

## IV. Of the Judgment in Replevin.

It is already observed that on the Co. Ent. 5751 Execution of the Writ of Replevin by the Sheriff, the Beasts distrained are actually returned to the Plaintiff, so that he hath the Possession and Use of the Cattle pending the Suit, and consequently if the Plaintiff in Replevin hath Judgment, it can only be for Damages; and therefore the Entry is, \* quod the Plaintiff, recuperet versus the Desendant, Damna sua occasione pramis, sed quia nescitur qua Damna

præd.

That the Plaintiff should recover against the Desendant his Damages by Occasion of the Premisses, but because it is unknown what Damages the aforesaid (the Plaintiff) has sustained by Occasion of the Premisses.

Carth. 362.

Salk. 205.

præd. (the Plaintiff) sustinuit occasione

ad Book of pramiff', a Writ of Enquiry is award-Judgm. 203. ed to enquire \* quæ Damna præd. (the Plaintiff) sustinuit tam occasione pramis, quam pro Miss & Custagiis suis, per ipsum circa sectam suam in bac parte appositis. And on the Return of this Inquisition the Plaintiff hath final Judgment, + quod recuperet versus præfatum (the Defendant) Damna 5 Mod. 118. sua præd. ad per Inquisitionem

Co. Ent. 575. præd. in forma præd. comperta, nec eidem (the Plaintiff) ad non requisitionem suam pro Misis & Custagiis suis præd. per Curiam bic de incremento adjudicata, quæ quidem Damna in toto se attingunt ad & prad. (the Defendant) in Misericordia.

\* To inquire what Damages the aforesaid (the Plaintiff) fustained, as well by Occasion of the Premisses, as for his Costs and Charges by him about his Suit in this Behalf expended.

<sup>+</sup> That he recover against the aforesaid (the Defendant) his Damages aforesaid to the Inquifition aforesaid in Form aforesaid found; and moreover to the fame (the Plaintiff) at his Request, for his Costs and Charges aforefaid by the Court here of Increase adjudged, which Damages in the Whole amount to and the aforefaid (the Defendant) in Mercy.

This Writ of Enquiry must be understood to iffue where the Plaintiff hath Judgment on a Demurrer, &c. and not on a Verdict; but if there be a Verdict for the Plaintiff, the Jury on that Verdict afcertains the Damages that the Plaintiff hath sustained by the unjust Caption and Detention, and also the Costs of Suit, and then there is no Occasion for a Writ of Enquiry; but the Judgment is, \* quod the Plaintiff recuperet versus the Desendant Damna prædicta per Juratores prædictos in forma prædicta assessa, nec non pro Misis, &c. de Incremento adjudicata, &c. and the Defendant in Misericordia.

On the other Hand if the Judgment Co. Ent. 572: be for the Avowant on Demurrer, 2d Book of Judgm. 205:

then

<sup>\*</sup> That the Plaintiff recover against the Defendant the Damages aforesaid by the Jurors aforesaid in Form aforesaid assessed; and moreover for Costs, &c. of Increase adjudged, &c. and the Desendant in Mercy.

then the Entry is, \* quod the Plaintiff nil capiat per breve fuum præd. fed sit in Misericordia pro falso Clamore suo, & præd. (the Desendant) eat inde fine die, &c. & babeat retornum averiorum præd. detinend' sibi irrepleg' in perpetuum, & qualiter, &c. Vic. con-stare faciat bic, &c. & quod præd. (the Defendant) Damna sua occasione præmiss' recuperare debeat; sed quia

21 H. 8. c. 19. nescitur, &c.

2d Book of

But if there be a Verdict for the Judgm. 206. Avowant, the Jury in that Verdict afcertains the Damages, and then there needs no Writ of Enquiry, but the Judgment is entered, + quod (the Defendant) habeat retornum averiorum pra-

<sup>\*</sup> That the Plaintiff take nothing by his Writ aforesaid, but be in Mercy for his false Claim, and the aforesaid (the Defendant) go hence without Day, &c. and have the Return of the Beafts aforefaid detained to him irreplevisable for ever, and in what Manner, &c. the Sheriff make appear here, &r. and that the aforefaid (the Defendant) ought to recover his Damages by Occasion of the Premisses; but because it is unknown.

<sup>+</sup> That (the Defendant) have the Return of the Beafts aforesaid, &c. It is also considered that

prædictorum, &c., Consideratum est etiam quod præd, (the Desendant) recuperet versus præs. (the Plaintiss) Damna sua præd. &c. per Juratores præd. in forma præd. assessa, nec non eidem (the Desendant) ad requisitionem suam pro Miss & Custagiis, &c.

So that wherever the Judgment is 2d Book of given on a Verdict either for Plaintiff Judgm. 206] or Defendant, that Verdict afcertaining the Damages, there needs no Writ of Enquiry to issue; but where the Judgment is not founded on a Verdict, but on a Demurrer or Non-pros. of the Plaintiff, &c. there the Damages must be ascertained by a Jury on a Writ of Enquiry, because what Damages either Party hath sustained is a Matter of Fact, and therefore to be settled by a Jury. But if both Parties consent that the Court shall settle the Damages

that the aforesaid (the Defendant) recover against the aforesaid (the Plaintiff) his Damages aforesaid, &c. by the Jurors aforesaid in Form aforesaid affessed; and moreover to the same (the Defendant) at his Request for Costs and Charges, &c.

2 without

without a Jury, then the Entry is \* fuper quæ Justic. bic ad petitionem ipsius (the Defendant) ex assensu præd. (the Plaintiss) assident Damna ipsius (the Defendant) occasione præmissa, &c. ultra Misas, &c. and this Judgment is good quia Consensus tollit Errorem.

#### As to the Retorno Habendo.

In all Cases where the Defendant in Replevin avows and hath Judgment, on such Avowry he shall have Return of the Beasts awarded, because the Avowry allows the Caption, but avoids the Injustice thereof, by shewing he had good Cause of taking such Distress, and consequently if such Cause of Caption be approved of by the Court, they must in Justice return the Pledge to the Avowant.

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<sup>\*</sup> Whereupon the Justices here on the Petition of the said (the Desendant) with the Assent of the aforesaid (the Plaintiff) assess the Damages of the said (the Desendant) by Occasion of the Premisses, &c. besides Costs, &c.

And where the Defendant instead of an Avowry pleads to the Writ of Replevin, that is where he does not admit the Caption and avoid the Injustice of it, but by Plea infifts that the Plaintiff ought not to have the Writ of Replevin, whether he the Defendant took them or not; yet here the Defendant in some Cases shall have Return without any Avowry or Conusance made; and in order to fettle this it will be necessary to take up a Distinction already observed between Pleas that disaffirm Property in the Plaintiff, and Pleas that admit the Property in the Plaintiff; as if the Defendant in the Replevin pleads Property in the Beafts in himself or in a Stranger, whether it be pleaded in Abatement of the Writ, Bro. Abr. tit. in Bar of the Action or in Justification, Retorn des if the Defendant prevails in it he shall Vens. 249. have Return without any Avowry, because if these Pleas be true they destroy all Right of Complaint in the Plaintiff for the Caption and Retention, and consequently if the Plaintiff hath no Right to the Writ of Replevin under the present Form, nor under any other, he ought to have no Benefit Q 3

from under his unjust Complaint, and therefore the Court must award Restitution of the Beafts to the Defendant. out of whose Possession they were taken by the Replevin.

But if the Defendant pleads Property in the Plaintiff, and 7. S. tho' this Plea abates the Writ under the present Form, yet by admitting the Property in the Plaintiff, it shews that the Plaintiff and J. S. have a Right to a Replevin under another Form, and confequently the Defendant shall not have Return of the Plaintiff's Beafts unless he shews good Cause for such Return, and avoids the Injustice of the first Caption complained of by the Plaintiff.

Bro. Abr. tit. Retorn des Avers, pl. 28.

So if the Plaintiff in Replevin lays the Caption in D. and the Defendant Raft. Ent. 554. pleads that he took them in S. \* abfque boc that he took them in D. this Plea if found for the Defendant may excuse him from Damages, but can never give him a Return of the Beafts

Without that.

without a Conusance or an Avowry, because he leaves the Plaintiff a Right to retain his Beafts, when he neither denies the Property to be in the Plaintiff, nor shews any Cause why he should take them as a Pledge.

If the Tenant offers his Rent at the Time of the Distress taken, or before impounding, and the Lord refuses to accept it, he shall never after have Return of the Beafts, tho' the Rent be Arrear, because the Distress is but a Pledge for the Rent, and when the Rent is offered, the Pledge ought to be restored, and consequently the Court will never award the Return of the Pledge to the Lord, which he ought to have reftored to the Plaintiff before the Replevin was taken out.

If the Plaintiff be nonsuit before he Bro. Abr. tit. declares, the Defendant shall have Re- Retorn des Avers, pl. 33. turn of the Beafts without making any Dyer 280. pl. Conufance or Avowry, because where 14. there is no express Charge made against the Defendant by a Declaration in Court, the Defendant hath not an Opportunity to shew his Cause of Caption; and fince this is owing to the Default

Default of the Plaintiff, he shall have no Advantage from it by detaining the Beafts: and therefore the Defendant on fuch Nonsuit shall have Return, tho' he hath made no Avowry; but if the Plaintiff in Replevin hath counted, and afterwards is nonfuited, fince by the Count the Defendant is charged with an unjust Caption and Detention, he must purge himself thereof by an Avowry, before he can be entitled to have Return; for the Return of the Beafts is ordered by the Court on the Justice of the original Caption; and therefore the Defendant must first shew the Justice of this Caption before he can have Return.

Bro. Abr. tit. Retorn des Avers, pl. 23.

But the Return in this Action was never irreplevisable at Common Law, whether the Nonsuit of the Plaintist had been before the Avowry or after, or before or after Issue joined, because where the Defendant had Judgment for a Return on a Nonsuit, tho' after Verdict, that Judgment was not founded upon the Verdict, but on the Default of the Plaintist in withdrawing himself at any Continuance Day after the Verdict; so that tho' the Defendant had

had Return, yet he had not the Justice or Legality of his Caption established by such Judgment; and therefore as long as the Caption and Detention was not determined by the Judgment of the Court, so long they allowed the Plaintiff after his own Nonsuit to take a new Replevin.

But this was found very inconvenient, because by this Means the Defendant could never get the Restitution of the Beasts; and therefore was not likely to recover his Rent, since he wanted the Pledge or Pain to compel the Tenant to the Payment.

To remedy this Mischief the Stat. of
West. 2. c. 2. taking Notice, that Stat. West. 2.
\* postquam adjudicatum fuerit Distringenti retornum averiorum, & sic districtus, postquam averia sic retornata
iterum

<sup>\*</sup> After the Return of the Beasts had been adjudged to him who made the Distress, and being thus distrained after he had again replevied the Beasts so returned; and when he foresaw that he who made the Distress was preparing to be ready to answer him in Court, made Desault, where-

iterum replegiaverit, & cum viderit distringentem comparentem in Curia, paratum sibi respondere, defaltam fecerit, ob quam iterum readjudicabitur distringenti retornum averiorum, & fic bis, vel ter, & in infinitum replegiabuntur averia, provides that quam cito adjudicatum fuerit retornum averiorum Distringenti, per breve de Judicio mandeter Vicecomiti, quod retornum babere faciat distringenti de Averiis, in quo Brevi inseratur, quod Vicecomes ea non deliberet fine Brevi, in quo fiat Mentio de Judicio per Justiciarios reddito, &c. which is the Writ of fecond Deliverance. So that by this Act, if the Plaintiff in Replevin be once nonsuit, he cannot now have a new Replevin,

upon the Return of the Beasts was again re-adjudged to him who made the Distress, and so the Beasts would be replevied twice or thrice, and without End, Provides, that as soon as the Return of the Beasts should be adjudged to him who made the Distress, the Sheriff should be commanded by a judicial Writ, that he cause him who made the Distress to have the Return of the Beasts, in which Writ should be inserted, that the Sheriff could not deliver them without a Writ, in which Mention should be made of the Judgment given by the Justices, &sc.

but the Writ of fecond Deliverance, which is a judicial Writ, and issued out of the Record of the Replevin, in which the Nonsuit was, and is to this Purpose.

\* Rex Vicecomiti E. salutem: Si A. Reg. Jud. 58. secerit te, &c. & etiam de Catallis b. 2 Inst. 341. Retornandis, quæ B. in Curiá nostrá, &c. adjudicata suerunt ob desaltam ipsus A. si Retornum inde adjudicetur: tunc eidem A. averia & catalla prædicta sine dilatione liberari sacias, & pone, &c. prædictum B. &c.

And by the above mentioned Act it 2 Inft. 341. is further provided, + quod si iterato

<sup>\*</sup> George the Second, &c. To the Sheriff of, &c. Greeting: If A. shall make you, &c. as well of the Cattle to be returned, which to B. in our Court, &c. were adjudged by Reason of the Default of the said A. if a Return of them should be adjudged, that you then cause the Beasts and Cattle aforesaid to be delivered without Delay to the same A. and put, &c. the aforesaid B. &c.

<sup>†</sup> That if he who replevied the Beasts should make Default a second Time, or the Return of the Distress should be adjudged by any other Means now twice replevied, the Distress should be for ever irreplevisable.

ille qui replegiaverit Averia, fecerit defaltam, vel alia occasione adjudicetur retornum Districtionis, jam bis Replegiatæ, remaneat Districtio illa in perpetuum irreplegiabilis. So that now if the Plaintiff do not prevail in the Writ of fecond Deliverance, but the Defendant hath Judgment, whether by the Nonsuit of the Plaintiff, by Abatement of the Writ, or by Discontinuance of the Plea, the Retorn is awarded irreplevisable; that is the Defendant shall detain the Beasts as a Pledge 'till the Rent or Duty for which they were originally taken be paid to the Defendant, and the Plaintiff shall never be admitted to disturb the Defendant's Possession by Replevin or Writ of fecond Deliverance.

2 Inft. 341.

But if the Plaintiff tender the Rent for which the Distress was originally taken, the Defendant ought to restore the Beasts, and if he resuses, the Plaintiff may recover them by Action of Detinue, because notwithstanding the Judgment for Return irreplevisable, the Beasts still remain as a Pledge, and if the Desendant resuse to make Restitution of the Pledge upon Tender of the Rent,

Rent, his Detention then is unlawful, and the Plaintiff may punish such Detention in an Action of Detinue, for the Return irreplevisable prevents the bringing back the Pledge, but does not west the absolute Property thereof in the Defendant, but only a qualified Property 'till the Rent is paid.

The Writ of fecond Deliverance is a 2 Inst. 3411 Supersedeas in Law to the Sheriff to forbear to execute the Writ de Retorno Habendo obtained on the Nonsuit of the Plaintiff, if it comes to the Sheriff before Return be made; if after Return be made, it is in the Nature of a new Replevin, as appears by the Form thereof before mentioned.

And the fecond Deliverance is al-2 Inft. 341; ways to bring back the same Distress which was first taken by the Defendant, and for which he hath already Judgment for a Return; so that if after the Nonsuit upon a Retorno Habendo the Sheriff returns \* Elongata, by Means whereof the Desendant hath other Beasts of the Plaintiff delivered

<sup>\*</sup> Eloigned.

him in Withernam, in this Case tho' there never was any Return of the original Diffress made to the Defendant. (because they were eloigned by the Plaintiff, so as the Sheriff could not make any Return of them) yet the fecond Deliverance must go for the first Distress, and the Plaintiff must declare of that Distress; for the Writ of second Deliverance is a judicial Writ which iffues out of the Record of the first Replevin, and therefore cannot vary from the Record out of which it iffues, because it seeks a Deliverance of those Cattle which were formerly adjudged to the Defendant on the Plaintiff's Nonfuit, and therefore \* ex vi Termini this second Deliverance must be of the same Beasts of which the first Deliverance was made to the Plaintiff by Replevin; but it feems after the second Deliverance purchased, the Plaintiff may move the Court for a Restitution of the Withernam Beasts.

Where the Defendant puts in a Plea to the Writ of Replevin, as Property

<sup>\*</sup> From the Term itself.

in a Stranger or in the Defendant, and these Pleas disaffirming the Property of the Plaintiff, are by Verdict found for the Defendant, or upon Demurrer adjudged for him; in these Cases the Defendant shall have Return irreplevisable. for there could be no new Replevin at Common Law, as upon a Nonfult. because the Court had already given their Judgment upon the Legality of the Caption; for if the Property be in the Defendant or a Stranger, the Plaintiff could have no Cause to complain; and therefore to grant a new Replevin, or which is the same Thing, not to have made the Return irreplevisable, were to leave that same Point open to an Examination, which hath already been determined; and no Writ of fecond Deliverance can be given by the Statute, for that is only upon the Plaintiff's Nonfuit.

But if the Defendant pleads Property in the Plaintiff and J. S. which only abates the Writ under the present Form, or pleads \* cepit in alio Loco, which

<sup>\*</sup> He took them in another Place,

abates the Count, and confequently the Writ; in these Cases as there can be no Return without an Avowry, for Reasons already given, so that Return cannot in the Nature of the Thing be irreplevifable, because these Pleas only abating the Writ must necessarily allow a Writ under a better Form, and it were a Contradiction to allow a new Replevin to the Plaintiff, for the same Beafts which the Court hath returned to the Defendant irreplevisable. the Plaintiff confesseth the Plea of the Defendant to be true, the Defendant shall have Return, but not irreplevifable.

2 Inft. 340.

If the Writ of Replevin abate for any Misprission in the Clerk, the Defendant shall have no Return at all, because the Plaintiff is in no Default, but the Officer; so that after such Abatement of the Writ, the Plaintiff's Possession of the Beasts continues; and therefore it seems that the Desendant in this Case is driven to a new Distress.

2 Inst. 340.

But if the Writ abate by Misinformation or other Default of the Plaintiff, the Defendant shall have Return of the Beasts, but not irreplevisable, because the Defendant by pleading to the Writ, allows the Plaintiff another Writ under another Form.

This Act which awards the Return 2 Inft. 340. irreplevisable, extends only to the King's fuperior Courts of Justice: For the Act directs quod Attachietur ille qui distrinxit ad veniendum ad certum diem coram Justiciariis, coram quibus Placitum deducatur in præsentid Partium, which Words are to be understood of the King's Justices in his superior Courts; for the Judges of inferior Courts are looked upon as more fubject to Mistake and Partiality, and therefore not to be trusted with the Power of awarding a Return irreplevifable, which is for ever to conclude the Plaintiff. But it seems that where Judgment was given upon Verdict and not upon Nonfuit, the inferior Courts could award a Return irreplevisable at Common Law.

That he should be attached who made a Distress for the coming at a certain Day before the Justices, before whom the Plea is to be carried on in the Presence of the Parties.

We come now to shew what Remedy the Defendant hath when he cannot come at the Beasts on the Write de Retorno Habendo.

z Inft. 338.

It is already observed that by the beforementioned Act of West. 2. c. 2. the Sheriff before he executes the Writ of Replevin is obliged to take from the Plaintiff \* non solum Plegios de prosequendo, sed etiam de averiis returnandis, si adjudicetur returnandis, si adjudicetur returnandis, se si quis alio modo plegios ceperit, respondeat isse de pretio averiorum, & babeat Dominus distringens recuperare per breve quod reddat ei tot averia vel catalla, & si non babeat Ballivus unde reddat, reddat superior suus. The Method of Proceeding upon this Act is, if the

2 Inft. 340. 3 Mod. 56,

\* Not only Pledges of profecuting, but also of returning the Beasts, if a Return of them should be adjudged; and if any one should take Pledges any other Way, he himself should answer the Value of the Beasts, and the Lord who made the Distress should recover by Writ, that he restore so many Beasts or Cattle to him; and if his Bailiss should not have wherewithal to restore, his Superior should do it.

Sheriff

Sheriff by the Writ de Retorno Habendo cannot find the original Distress, but returns \* Elongata, the Defendant hath a Scire Facias to fummon the Persons who became Pledges for the Plaintiff at the Execution of the original Replevin, that the Plaintiff would make Return of the original Distress if Return thereof should be awarded; this Scire Facias brings the Pledges into Court, and thereby gives them an Opportunity to contest why the Defendant should not have Return of their Beasts, fince the Plaintiff's Beafts cannot be found, for whom they were Pledges; if the Pledges cannot shew Cause, then the Defendant hath a Writ to have Return of the Beafts of the Pledges instead of the Plaintiff's.

If the Pledges prove infufficient, 2 Infl. 340. To as the Sheriff can find none of their Cattle, and thereby is obliged to Bro. Abr. tit. return nibil on the Writ issued against Avers, pl. 2. the Beasts of the Pledges, the Sheriff Dalt. Sher. then himself by the said Act becomes 275. liable, and the Defendant hath a Scire

<sup>\*</sup> An Eloignment.

Facias grounded upon the faid Act. quod reddat ei (the Defendant) + tot averia of catalla; so that the Defendant is now secured against the Danger he was exposed to at Common Law. which was, that the Plaintiff who had the Possession of the Distress restored to him by the Execution of the Replevin, would often fell or dispose of them pending the Suit, and fo the Defendant tho' he had Judgment loft the Fruits of it.

There is another Remedy for the Defendant where the Sheriff returns Elongata on the Writ de Retorno Habendo, and that is by Withernam against the Plaintiff's Beafts; but this is already mentioned under the Title Withernam.

7 W. 3. c. 22. And now by the Statute of 17 Car. 2. c. 7. it is enacted, That wherever any Plaintiff in Replevin shall be nonfuit before Issue joined in any Court of Record, the Defendant

<sup>\*</sup> That he return to him.

<sup>†</sup> So many Beafts or Cattle.

making a Suggestion in Nature of an Avowry or Conusance for such Rent, to ascertain the Court of the Cause of fuch Distress, the Court upon his Prayer shall award a Writ, &c. to enquire touching the Sum in Arrear at the Time of fuch Distress taken, and the Value of the Goods or Cattle distrained, &c. and upon the Return of the Inquisition, the Defendant shall have Judgment to recover against the Plaintiff the Arrearages of fuch Rent, in Cafe the Goods or Cattle distrained amount unto the Value; and in Cafe they shall not amount to that Value. then fo much as the Value of the faid Goods and Cattle fo diffrained shall amount to, with his full Costs of Suit: and shall have Execution thereupon by Fieri Pacias or Elegit, or otherwife. So if Judgment be given upon Demurrer for the Avowant for any Rent. And in Case the Plaintiff shall be nonfuit after Conusance or Avowry made, and Issue joined; or if the Verdict shall be given against the Plaintiff, the Jurors that are impanelled to enquire of fuch Issue, shall at the Prayer of the Defendant enquire concerning

the Sum in Arrear, and the Value of the Goods or Cattle distrained, and thereon the Avowant shall have Judgment, &c.

Carth. 253. Baker v. Lade. Where upon a Demurrer the Defendant had Judgment for a Return irreplevisable at Common Law, and a Writ of Enquiry awarded pursuant to this Statute, on Error brought, it was objected, that when the Defendant proceeds on the Statute, he ought not to have Judgment for a Return; but the Court held that the Judgment was well given, for the Statute doth not alter the Judgment at Common Law, but only gives a farther Remedy.

Quære, Whether a Writ of \* second Deliverance lies since this Statute, when the Avowry is for Rent, see Vent. 64.

\* Mich. 6 Geo. 2. Keaf v. Weldon in B. R. in Irel. a fecond Deliverance was denied in the Case of a Nonsuit for Rent.

VIII. Of

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VIII. Of the Writ of Recaption.

It is already observed, that where F.N.B. 71. E. the Defendant hath Judgment upon his Avowry in Replevin, he shall have Restitution of the Beasts, to detain them as a Pledge, until the Rent or Duty for which they were taken be paid or fatisfied; and fince he hath got Security to have Return upon making out the Justice of his first Caption, it is highly reasonable that pending that Suit the Tenants should be protected from farther Distresses for the same Rent or Cause for which the first Distress was taken; and for this Purpose the Writ of Recaption was framed, in which if the Defendant be convicted he shall be fined to the King, because by the fecond Caption the Defendant takes upon him to determine the Juflice and Legality of the first, while that very Point is under the Confideration of the Court of Justice in which the Replevin depends; for if the first Distress were lawful, he shall have Return of it, and therefore the fecond is unreasonable; and if the first were R 4

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unlawful, much more so is the second Taking for the same Cause, so that the Recaption lies where the Cause of the first Caption was just.

- F.N.B. 71. E. But it feems that if A. distrains Beasts Damage Feafant, and pending that Suit, the same Cattle or other Cattle of the same Proprietors trespass the Soil of A. A. may distrain again pending the first Suit, because each Distress is for a distinct and several Trespass or Injury, for which A. is intitled to Satisfaction; for the Restitution of the Cattle for the first Trespass will be no Compensation for the second Trespass, fince A. cannot legally with-hold them as a Pledge for Satisfaction of a fecond Trespass, when the first is satisfied.
- F.N.B. 72. B. The Design then of the Writ of Recaption being to prevent a second Distress for the same Rent or Duty, it follows that the Desendant cannot avow as in Replevin, because the Avowry is in order to have a Return of the Pledges, but in Recaption whether the first Distress were just or unlawful,

lawful, the Defendant cannot have Return of the Beasts under the Notion of the Pledge, for that were to invert the Design of the Law, by allowing the Desendant a second Distress by Judgment upon that very Writ which was framed to punish the Person taking a second Distress for the same Thing.

In the Writ therefore of Recaption F.N.B. 72. B. the Defendant must \* justify as in Trespass, because since he cannot avow the Taking under the Notion of a Pledge for a Rent or Duty, (in as much as he hath already a Pledge for that, which will be returned to him, if in the Event of the Suit in the Replevin the Rent appears to be in Arrear) he must therefore be looked upon as a Trespasser, unless he can justify the Taking for another Cause.

\* Note the Desence, viz. desendit vim & Injuriam quando, &c. & quicquid est in contemptum Domini Regis & ejus mandati, 29 Ed. 3. 28.

<sup>\*</sup> He defends the Force and Injury when, &c. and whatever is in Contempt of the Lord the King and his Command.

And hence it is that there are no Pledges de Retorno Habendo taken from the Plaintiff as in the Replevin, because tho' the Deliverance of the Beasts to the Plaintiff be immediate, as in the Replevin, yet the Defendant can have no Return, because if the Rent or Duty was unpaid for which the Diffress was taken, the Defendant will have Restitution of his first Distress, which being to remain in his Hands 'till the Rent be paid, there is no Reason for the Restitution of the second Distress, and consequently no Occasion for the Pledges de Retorno Habendo, as in the original Replevin.

F.N.B. 72. B. And here it is not necessary to entitle a Man to the Writ of Recaption, that the same Beasts or Cattle be taken the second Time, which were first taken, but only that the Cattle or Beasts of the same Person be distrained for the same Rent or Duty; for the Injury is the same to the Plaintiff in Replevin, whether the first Distress be again taken, or any other Goods or Cattle of the Plaintiff, and the Writ of Recaption is to punish the Injury.

But

But if the Lord distrains the Beasts F.N.B.72. G. of his Tenant for Rent, and afterwards distrains the Beasts of J. S. a Stranger, being on the Land, for the same Rent, in this Case no Writ of Recaption lies for this second Distress; not for the Tenant, because the second Distress is not of the Tenant's Beasts, nor for J. S. because the Beasts of J. S. were not formerly taken, and therefore J. S. must take out an original Replevin, or his Action of Trespass, as he thinks fit.

Yet if the Lord distrains his Tenant, F.N.B.71. H. and pending that Plea the Lord commands his Servant to distrain the Tenant again for the same Rent, the Tenant shall have a Recaption against the Lord himself for the second Distress, because the second Distress is esteemed in Law to be taken by the Lord himself, according to the Rule application of the Servant had taken the second Distress without the Lord's Command, yet if the Lord had after-

<sup>\*</sup> He who does by another does it by himfelf.
wards

wards by any Act subsequent agreed to the Taking of the second Diffress, as by joining in Aid with the Servant to defend the Justice of the Caption, such subsequent Agreement makes it a Distress of the Lord's, and to have been taken in his Right \* ab initio; for + omnis ratibabitio mandato æquiparatur; and a parol Agreement of the Lord's to the fecond Distress seems fufficient. But if there be no fuch Command, or subsequent Agreement of the Lord's, the Tenant shall have no Recaption either against the Lord or the Servant, tho' the Servant makes Conusance of the second Distress in Right of his Lord, and for the same Rent for which the Lord took the first Distress; for the Writ of Recaption is to punish the fecond Caption, only where it is wilfully made by the fame Person that made the first, or by another under his Direction or Authority; and it may be that the Lord and his Servant had not Notice of each other's Caption.

From the Beginning.

<sup>†</sup> Every Ratification is equal to a Command.

So that it feems that where there is F.N.B.71.G. no precedent Command, nor a subsequent Agreement of the Lord's to the Servant's second Caption, the Tenant is left to his Action of Trespass against the Servant, because the second Caption is a Violation of Property, and unlawful, tho' the Rent be in Arrear, since the Lord by the first Distress bath taken a Pledge for his Rent, which will be returned to him if in the Event of the Suit in Replevin the Tenant be found to be in Arrear.

If the Lord distrains the Beasts of A. F.N.B. 71. I. and B. for Rent, and for the same 72. E. Rent distrains a second Time the Beasts of A. only, A. shall have a Writ of Recaption against the Lord, because there is a Distress of A. already for that Rent, which the Lord will have a Return of if the Rent be found in Arrear.

But if the first Distress had been F.N.B.72. E. only of A. the Tenant, and the second Distress had been the Cattle of A. and of B. a Stranger, which they have in common, Fitz-Herbert makes a Doubt whether

whether A. in this Case shall have a Recaption, because of B.'s Interest in the Cattle, for it is plain B. cannot join in the Recaption, because his Beasts were never distrained before.

F.N.B.71.M.

If the Lord distrains his Tenant, and he replevies them, and the Lord avows for Rent, and the Tenant pleads \* rien Arrear, or levied by Distress, and pending this Suit another Gale of Rent becomes due, the Lord may distrain again the Beasts of the Tenant for the last Rent incurred, and no Writ of Recaption lies for the Tenant, because these Distresses are for two distinct Causes, that is for two several half Year's Rent.

But if the Tenant pleaded to the Avowry in the first Replevin + Hors de son Fee, and pending that Suit the Lord had distrained again for another half Year's Rent, the Tenant should have a Writ of Recaption, because by the Plea of + Hors de son Fee the

<sup>\*</sup> Nothing in Arrear.

<sup>+</sup> Out of his Fee.

Lord's Title to the Rent itself, and not to this or that particular Gale, is in Dispute, and that Title may be determined by the first Caption, and therefore the second Distress being unnecessary to try the Title to the Rent, the Writ of Recaption lies to prevent it, and punish the Lord for taking the second Distress, and to protect the Tenant from such Oppression.

And this Writ of Recaption lies for F.N.B. 72. A. the Tenant before Avowry made by the Lord in the first Replevin, for otherwise the Remedy would not be adequate, because the Lord might otherwife harrass the Tenant by several Distresses, before the Lord by the Rules of Court could be compelled to avow; but then the Tenant must in his Declaration on the Recaption aver that the second Distress was taken for the fame Cause as the first, for otherwise the Tenant fails in making out to the Court his Title to the Writ of Recaption, and consequently cannot punish the Lord for taking the second Distress.

#### OBSERVATIONS.

The two following Cases are taken from Strange's Reports since the Author wrote.

- 1. Where in Replevin the Place is material, see Johnson v. Wollyer, Strange 507.
- 2. No Replevin of Goods taken upon a Conviction, see The King v. Monkhouse, Strange 1084.



APPENDIX.

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# APPENDIX.

PRECEDENTS of Pleadings in Replevins.

HE King, &c. We command you Writ of Rethat justly and without Delay you plevin. cause to be replevied the Cattle of B. which D. took and unjustly detains, as it is faid, and afterwards thereupon cause him justly to be removed, that we may hear no more Clamour thereupon for want of Justice, &c.

A. B. complains against C. D. in a Plea Plaint. of taking and unjustly detaining his Cattle against Sureties and Pledges, &c.

> ) E. F. Pledges to profecute,

Walker against Towersey and others,

M. 9 W. 3. Roll 48.

Declaration. Pract. Reg. 157.

Midd, to wit, TOHN Towersey, Robert Wheeler and William Stubbins, were summoned to answer to Thomas Walker in a Plea, why they took a filver Porrenger of the faid Thomas and unjustly detained it, against Surety and Pledges until &c. And whereon the fame Thomas by J. L. his Attorney complains that the faid John, Robert and William, on the first Day of May in the 9th Year of the Reign of the Lord William the Third, now King of England, &c. in the Charterboufe in the county of Middlefex aforefaid, in a certain Place there called the Dwellingboule of him the faid Thomas, took the faid Porrenger of him the faid Thomas and unjustly detained it, against Surety and Pledges until, &c. whereby the fame Thomas fays that he is prejudiced, and hath Damage to the Value of 30 %. And therefore he produces the Suit, &c.

Cognifance by

And the faid John, Robert and William, Overseers for by R. H. their Attorney come and defend a Poor's Rate. the Force and Injury when, &c. and well acknowledge the Taking of the Porrenger aforefaid in the faid Place in which, &c. and justly, &c. because they say, that at the said Time when, &c. the same John and Robert being Overseers of the Poor of the Parish of St. Sepulchre in the County of Middlefex

Middlefex, by Virtue of a certain Warrant under the Hands and Seals of William Withers, Esq; and Thomas Smith, Esq; then two of the Justices of the Lord the now King, affigned to preferve the peace in the County aforefaid (Quorum unus) to the Warden of the Church and the Overseers of the Poor of the same Parish, or any of them, directed, at the faid Place in which, Ge. demanded of the faid T. Walker to pay them 10s. 6d. of lawful Money upon him duly affested towards the Relief of the Poor of the Parish aforesaid, by the Authority and according to the Tenor, Purport and Effect, of a certain Statute made 43 El. c. 2] and provided in a Parliament of the Lady 5.19. Elizabeth, late Queen of England, &c. held at Westminster in the County of Middlesex in the 42d Year of her Reign; and because the same Thomas then and there refused to pay the faid 10 s. 6 d. to them the faid John and Robert, they the same John and Robert, as Overfeers of the Poor aforefaid, and the faid William at their Request and in their Aid, for the Prefervation of the Peace of the faid Lord the King, (the fame William being then a Constable within the Parish aforesaid) by Virtue of the Statute and Warrant aforefaid well acknowledge the Taking of the Porrenger aforefaid, the faid Time when, &c. in the faid Place in which, &c. in the Name of a Distress for the said 10 s. 6 d. upon him the faid T. Walker as aforefaid affeffed towards

wards the Relief of the Poor of the Parish aforesaid, then being in Arrear and unpaid, and justly, &c. And this they are ready to verify: Wherefore they pray Judgment, and a Return of the Porrenger aforesaid. to be adjudged to them, &c.

Repl.

propria.

And the faid Thomas fays, that the faid De injuria sua John, Robert and William, by the Reason before alledged, the Taking of the Porrenger aforesaid of him the said Thomas in the faid Place in which, &c. ought not to acknowledge just, because he says, that the faid John, Robert and William, the Day and Year aforefaid in the Declaration aforesaid mentioned, of their own Wrong, without fuch Caufe by them in their Cognifance aforesaid above mentioned, the Porrenger aforesaid of him the said Thomas in the faid Place in which, &c. took and unjustly detained, against Surety Pledges, &c. in Manner and Form as the faid Thomas above against them complains: And this he prays may be inquired of by the Country: And the faid John, Robert and William likewise, &c. Therefore, &c.

### Croffe against Bilfon.

Declaration. For taking a Mare in the Highway. Salk. 3. Pract. Reg. 1 \$7.

North'ton, to wit. 70HN Bilson fummoned to anfwer to Samuel Crosse in a Plea, why he took a Mare of him the faid Samuel and unjustly detained it, against Surety and Pledges, &c. And whereon the same Samuel muel by W. L. his Attorney complains, that the said John on the first Day of October in the 12th Year of the Reign of the Lord William the Third, late King of England, &c. at Harding ston in the county aforefaid, in a certain place there called the King's bigbway, a mare of him the faid Samuel took and unjustly detained it, against Surety and Pledges, until, &c. whereby the same Samuel says that he is prejudiced, and hath Damage to the Value of 10 l. And therefore he produces the Suit, &c.

And the faid John Bilson by J. B. his Cognisance Attorney comes and defends the Force and for Damage Feafant. Injury when, &c. and as Bailiff of the most noble William Lord Leimpster well acknowledges the Taking of the Mare aforefaid the faid Time when, &c. in a certain Place called the Queen's highway, and justly, &c. because he says, that the said Place contains, and the faid Time when, &c. did contain in itself, half a Rod of Land with the Appurtenances in Hardingston aforesaid; which said half Rod of Land long before and the faid Time when, &c. was Parcel of a certain antient Messuage in Hardingston aforesaid; which said Messuage long before, and the faid Time when, &c. was the Soil and Freehold of the faid Lord Leimpster; and because the Mare aforesaid the faid Time when, &c. was in the faid half Rod of Land in which, &c. doing Damage there, the faid John, as Bailiff of the said William Lord Leimpster, well ac-

knowledges the Taking of the Mare aforefaid in the Place in which, &c. and juftly, &c. doing Damage there, &c. without that, that the faid John took the Mare aforesaid in a certain Place called the King's bigbway, as the faid Samuel against him hath declared: And this he is ready to verify: Wherefore he prays Judgment, and a Return of the Mare aforefaid, to be adjudged to him. &c.

Plea in Main-Declaration.

And the faid Samuel fays, that the faid tenance of the John Bilson, as Bailiff of the most noble William Lord Leimpster, the Taking of the Mare aforefaid ought not to acknowledge just, because he says, that he the said John Bilson the said Time when, &c. took the Mare aforesaid in the said Place then called the King's bigbway, in Manner and Form as the faid Samuel above by declaring hath alledged: And this he prays may be inquired of by the Country.

Demurrer.

And the faid John fays, that he to the Plea of the faid Samuel above in replying pleaded hath no Necessity, nor is by the Law of the Land obliged in any Manner to aniwer, because he says, that the same Plea is not sufficient in Law to maintain his Declaration aforefaid: And this he is ready to verify: Wherefore for want of a fufficient Replication in this Behalf the same John as before prays Judgment, and that the Declaration aforesaid may be quashed.

And the faid Samuel, for that he hath Joinder. above alledged sufficient Matter in Law for him the faid Samuel to maintain his Action and Declaration aforefaid, which he is ready to verify, which said Matter the faid John doth not deny, nor to the fame in any wife answer, but that Averment hath altogether refused to admit, prays Judgment, and his Damages by Reason of the Taking and unjust Detention of the Mare aforesaid, to be adjudged to him, &c. And because the justices here will ad- 1 Sid. 189, vise themselves of and upon the Premisses 190. before they give Judgment thereon, Day 1 Ven. 135. is given to the Parties aforesaid here until Cro. El. 202. from the Day of St. Michael in three Weeks to hear their Judgment thereon, because the same Justices here thereof not yet, &c. On which Day here comes as well the faid Samuel as the faid John by their Attornies aforefaid, and hereupon the Judgment for Premisses being seen, and by the Justices the Plaintiff. here more fully understood, it seems to the same Justices here, that the Plea of the faid Samuel above in replying pleaded is sufficient in Law to maintain his Declaration aforesaid, as the faid Samuel hath above alledged; wherefore the faid Samuel ought to recover his Damages by Reason of the Premisses against the said John: But because it is unknown what Damages Inquiry a the faid Samuel hath fustained by Reason warded. of the Premisses, the Sheriff is commanded, that by the Oath of 12 good and lawful men of the County aforesaid he diligently inquire what Damages the faid Samuel hath fustained, as well by Reason of . the Premisses, as for his Costs and Charges by him about his Suit in this Behalf expended; and the Inquisition which he shall thereof make certify here on the Octave of St. Hillary under the Seal, &c. and the Seals, &c. On which Day here comes the faid Samuel by his Attorney aforefaid; and the Sheriff, to wit, Cafar Child, Bart. hath now returned here a certain Inquisition taken before him at the Town of North'ton in the County aforesaid on the 19th Day of January last past by the Oath of twelve, &c. whereby it is found that the faid Samuel hath fustained Damages by Reason of the Premisses, besides his Costs and Charges by him about his Suit in this Behalf expended, to 80 s. and for those Costs and Charges to 2 d. Therefore it is considered, that the faid Samuel do recover against the faid John his Damages aforefaid to 80 s. and 2 d. by the Inquisition aforesaid in Form aforesaid found, and also 12 l. 175. 4 d. to the said Samuel at his Request for his Costs and Charges aforesaid, by the Court here of Increase adjudged; which faid Damages in the Whole amount to 161. 17 s. 6d. And the faid John in Mercy, &c.

Final Judg-

General Errors affigued.

Afterwards, to wit, on Day next after in this same Term, before the Lady the Queen at Westminster comes the said

faid John by A. M. his Attorney and fays, that in the Record and Proceedings aforesaid, and likewise in the Rendition of the Judgment aforesaid, there is manifest Error, in this, to wit, that by the Record aforesaid it appears that the Judgment aforesaid in Form aforesaid given, was given for the faid Samuel Croffe against him the faid John Bilson, when by the Law of the Land of this Kingdom of England Judgment in the Plea aforefaid ought to have been given for the faid John against the faid Samuel: There is Error also in this, to wit, that by the Record aforesaid it appears that the faid John was fummoned to answer to the said Samuel in the Plea aforesaid, yet no original Writ be- No Original. tween the Parties aforesaid in the Plea aforefaid is filed of Record, nor remains of Record in the faid Court of the Lady the Queen of the Bench; therefore in that there is manifest Error: There is Error also No Warrant in this, to wit, that by the Record afore- of Attorney. faid it appears that the faid Samuel in the faid Court of the Lady the faid Queen of the Bench came and appeared by W. L. his Attorney, yet the faid W. L. had no Warrant of Attorney of Record by Writ of the now Lady the Queen, nor without Writ, to warrant his Appearance for the same Samuel in the Plea aforesaid: There is Error also in this, to wit, that by the Record aforesaid it appears that the said John in the said Court of the said Lady. the

the now Queen of the Bench appeared by William Marriot his Attorney; neverthelefs W. M. had no Warrant of Attorney of Record by Writ of the Lady the Queen, Several Certi- And the fame John prays feveral Writs of

oraries prayed.

Rule to return them.

No Error.

nor without Writ, to warrant his Appearance for the faid John in the Plea aforefaid: the Lady the Queen, to wit, one to the Chief Justice of the said Lady the Queen of the Bench, and another Writ to the Cuftos Brevium of the faid Lady the Queen of the Bench aforesaid to be directed, to certify the faid Lady the now Queen more fully the Truth thereof: And to him they are granted, &c. Whereupon Tuesday next after 15 Days of the Holy Trinity is given by the Court of the faid Lady the Queen now here, to return to the Court of the faid Lady the Queen, before the Queen herfelf at Westminster, the faid several Writs of Certiorari above prayed: The fame Day is given to the faid Samuel there, &c. And the faid Chief Tuffice of the Bench aforesaid, and the said Custos Brevium of the faid Lady the now Queen, on that Day have not, nor hath either of them, returned the several Writs aforesaid, neither have they, or either of them, done any Thing therein: And hereupon the faid Samuel freely here into Court comes and fays, that there is no Error either in the Record and Proceedings aforefaid, or in the Rendition of the Judgment aforefaid; and prays that the Court of the faid Lady. the

the Queen now here may proceed to the Examination as well of the Record and Proceedings aforefaid, as of the Matters aforesaid above for Error assigned, and that the Judgment aforesaid may be in all Things affirmed: But because the Court of the faid Lady the Queen now here are not yet advised to give their Judgment of and upon the Premisses, Day therefore is given to the Parties aforesaid before the Lady the Queen until in a Month of St. Michael wheresoever, &c. to hear their Judgment thereon, because the Court of the faid Lady the Queen now here thereof not yet, &c. On which Day before the Lady the Queen at Westminster come the Parties aforesaid by their Attornies aforefaid; whereupon as well the Record and Proceedings aforefaid, and the Judgment on the fame given, as the faid Causes and Matters above for Error affigned and alledged, being feen, and by the Court of the faid Lady the Queen now here more fully understood and diligently examined, because it seems to the Court of the said Lady the Queen here, that the Judgment aforefaid is in nothing vitious or defective, and that there is no Error in that Record; It is confidered, that the Judgment afore- Judgment affaid be in all Things affirmed, and remain firmed. in its full Force and Effect, the faid Caufes above for Error affigned in any wife notwithstanding, &c. And it is farther confidered by the same Court, that the said

Samuel do recover against the said John 12 l. to the same Samuel by the Court of the said Lady the Queen now here by his Assent adjudged, according to the Form 3 H. 7. c. 10. of the Statute thereof lately made and provided, for his Costs, Charges and Damages, which he hath sustained by Reason of the Delay of Execuion of the Judgment aforesaid, on Pretence of prosecuting the said Writ of the Lady the Queen to correct Error of and upon the Premiss; and that the same Samuel may have thereof his Execution, &c.

### Hubbard against Handford,

Declaration. Replevin in K, B.

Midd', to wit. Plchard Handford was fummoned to answer to Richard Hubbard in a Plea, why he took the Goods and Chattels of him the faid Richard Hubbard and unjustly detained them, against Surety and Pledges until, &c: And whereon the same Richard Hubbard by J. P. his Attorney complains, that the faid Richard Handford on the 7th Day of October in the 2d Year of the Reign of the Lord and Lady William and Mary now King and Queen of England, &c. at the Parish of St. Margaret Westminster in the County aforesaid, in a certain Place there called Peter-street, took the Goods and Chattels following, to wit, one jack, two spits, 18 pewter plates, &c. (reciting several other Particulars) of the faid Richard Hubbard,

Hubbard, and unjustly detained them, against Surety and Pledges until, &c. whereby the same Richard Hubbard says that he is prejudiced, and hath Damage to the Value of 20 l. And therefore he produces

the Suit. &c.

And the faid Richard Handford by J. L. his Attorney comes and defends the Force and Injury when, &c. and well avows the Taking of the Goods and Chattels aforefaid in the faid Place where, &c. and justly, &c. because he says, that the same Place, where the Taking of the Goods and Chattels aforefaid is supposed to be, contains, and at the fame Time when the Taking of those Goods and Chattels is supposed to be, did contain in itself, a certain Piece or Parcel of Land with the Appurtenances in a Place called Peterfreet, otherwise Bowling Alley, in the Parish of St. Margaret Westminster aforesaid in the County aforesaid; of which said Sir Robert Piece or Parcel of Land with the Appur- Marsham seitenances one Robert Marsham, Knt. before sed in Fee of the said Time when, &c. was seised in his where, &c. Demesne as of Fee; and being so thereof demised it to seised, the said Robert before the said the Defendant Time when, &c. to wit, on the 16th Day for 51 Years. of May in the first Year of the Reign of the Lord and Lady the now King and Queen, at the Parish of St. Margaret Westminster aforesaid in the County aforesaid, demised the same Piece or Parcel of Land with the Appurtenances to the faid Richard Handford,

Handford, to hold to the fame Richard and his Affigns from the Feast of the Bleffed Virgin Mary then last past before the Date of the same Demise, for the Term of 51 Years from thence next enfuing and fully to be compleat and ended: By Virtue of which said Demise the said R. Handford was possessed of the same Piece or Parcel of Land for the Term aforefaid; and fo being thereof poffessed, the same R. Handford afterwards and before the faid Time when, &c. had erected and built the faid Meffuage or Tenement on the Piece of Parcel of Land aforefaid, and was thereof possessed; and being so thereof possessed, he the same Richard Handford before the faid Time when, &c. to wit, on the 20th Day of December in the first Year of the Reign of the faid Lord and Lady the now King and Queen abovefaid, demised the Messuage aforesaid with the Appurtenances to the faid Richard Hubbard from the Feast of the Birth of our Lord then next following for the Term of one whole Year from thence next ensuing fully to be who demifed compleat and ended; Yielding therefore k to the Plain- for the same Year to the said Richard tiff for a Year Handford, or his Affigns, the Rent of 151. of lawful Money of England, at the

four most usual Feasts in the Year, to wit, the Feafts of the Annunciation of the Bleffed Virgin Mary, St. John the Baptift, St. Michael the Archangel, and the Birth

at 151.

of our Lord, by even and equal Portions:

By Virtue of which faid Demise the faid Richard Hubbard into the Meffuage aforefaid with the Appurtenances entred, and was thereof possessed, and the same Meffuage with the Appurtenances for the Space of three Quarters of a Year occupied; and because the Sum of 11 l. 5 s. of the Rent aforesaid, after the Demise so made for the faid three Quarters of a Year at the and for three Feaft of St. Michael last past, and before Quarters Rent the Taking of the Goods and Chattels Arrear diaforefaid, were to the same Richard Hand-strained. ford in Arrear and unpaid, the same Richard Handford well avows the Taking of the Goods and Chattels aforefaid in the faid Place where, &c. and justly, &c. for the faid 111. 5s. to the fame Richard Handford in Form aforesaid being in Arrean. as in the Messuage aforesaid with the Appurtenances to the Diffress of the faid Richard Handford in Form aforesaid charged and bound: And this he is ready to verify: Wherefore he prays Judgment, and a Return of the Goods and Chattels aforesaid, to be adjudged to him.

And the faid R. Hubbard fays, that the Repl' That faid R. Handford for the Reason before at the Rent was ledged ought not to avow the Taking of not in Arrear. the Goods and Chattels aforefaid in the faid Place where, &c. just, because he fays, that the faid 111. 5s. of the Rent aforesaid at the said Time when, &c. were not in Arrear and unpaid to the faid Riebard Handford, nor was any Penny thereof

Iffue.

at the faid Time when, &c. in Arrear to the faid Richard Handford, as the faid Richard Handford in his Avowry aforesaid hath above alledged: And this he prays may be inquired of by the Country: And the faid Richard Handford likewise, &c. Therefore the Sheriff is commanded, that he cause to come before the Lord and Lady the King and Queen from the Day of the Holy Trinity in three Weeks wherefoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties aforesaid, &c. On which Day before the Lord and Lady the King and Queen at Westminster come the Parties aforesaid by their Attornies aforesaid; and the Sheriff hath not returned the Writ, nor done any Thing therein; therefore as before the Sheriff is commanded, that he cause to come before the Lord and Lady the King and Queen from the Day of St. Michael in three Weeks wherefoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The fame Day is given to the Parties. aforesaid, &c.

Legg against Stephens and others.

Declaration. Gloucester, to wit. THomas Stephens, Efq; Robert Parker, Esq; and Richard Broke, were fummoned to answer to Nicholas Legg in a Plea, why

they took the Cattle of him the faid Nicholas and unjustly detained, against Surety and Pledges until, &c. And whereon the efame Nicholas by P. Hodges his Attorney complains, that the faid Thomas, Robert and Richard, on the 10th Day of November in the 32d Year of the Reign of the Lord Charles the Second, now King of England, &c. at the Parish of Old Sodbury in the County aforesaid, in a certain Place there called the Stub Riding, took the Cattle, to wit, two oxen of him the faid Nicholas and unjustly detained them, against Surety and Pledges until, &c. whereby the same Nicholas fays that he is prejudiced, and hath Damage to the Value of 20 l. And therefore he produces the Suit, &c.

And the faid T. Stephens, R. Parker and Avowry for a R. Brooke, by T. Edwards their Attorney Diffres for an come and defend the Force and Injury Amercement when, &c. and the faid T. Stephens and R. Parker well avow, and the faid Richard. as Bailiff of the faid T. S. and R. P. well acknowledges the Taking of the Cattle aforesaid in the said Place where, &c. and justly, &c. because they say, that the same Place, where the Taking of the Cattle aforesaid is supposed to be, doth contain, and at the faid Time, when the Taking of those Cattle is supposed to be, did contain in itself 80 Acres of Meadow with the Appurtenances, called Stub Riding, fituate in the Parish of Old Sodbury, and then and from Time immemorial was and yet is Parcel of the Manor and within the Manor

Seifin

Prescription.

Court Leet.

Manor of Old Sodbury in the county aforefaid, and within the Jurisdiction of the Court-Leet and View of Frankpledge within specified; and that long before the faid Time when, &c. to wit, on the 10th Day of March in the 32d Year of the Reign of the faid Lord the now King, and long before, the faid T. S. R. P. and one J. Neale late of Deane in the County of Bedford, Efg. were jointly feifed of and in the faid Manor of Old Sodbury aforefaid with the Appurtenances, fituate within the Parish of Old Sodbury aforesaid, in their Demesne as of Fee; and that at the faid Time when, &c. the faid N. Legg was and yet is Occupier of the faid Close called Stub Riding, and that the faid T.S. R.P. and J.N. and all those whose Estate the same T. R. and J. have in the fame Manor with the Appurtenances, from Time immemorial have had, and been accustomed to have, within the Manor aforesaid, a certain Court of View of Frankpledge, and all Things which to a Court of View of Frankpledge belong, of all the Inhabitants and Refiants within the Manor aforefaid twice a Year, to wit, once within a Month next after the Feast of Easter, and again within a Month next after the Feast of St. Michael the Archangel, before their Steward of that Court for the Time being within that Manor yearly to be held, as to the faid Manor with the Appurtenances belonging and appertaining: And the faid Thomas, Robert and Richard farther fay, that before the faid Time when, &c. to wit, at a Court of View of Frankpledge of the said Thomas, Robert and John, held at Old Sodbury aforesaid within the Manor aforesaid, within a Month next after the Feast of Easter, to wit, on the 10th Day of April in the 32d Year of the Reign of the faid Lord the now King of England, &c. before T. Edwards, being then Steward of the faid T. Stephens, R. Parker and J. Neale, of the Court of View of Frankpledge, by the Oath of 12 free and lawful Men within the Parish aforesaid refiant and inhabiting, then and there to inquire and prefent those Things which to the Court-Leet and View of Frankpledge aforesaid then belonged, then in the same Court being charged and fworn, then and there in the same Court it was presented, Presentment. among other Things, that the faid Nicholas Legg the now Plaintiff, then and for three Months then last past being Occupier of the said Close called the Stub Riding within the Jurisdiction of that Court, had not opened the King's Highway, being within the Precinct of the Manor aforesaid, and within the Precinct of the Leet aforefaid, and the Jurisdiction of the said Court of View of Frankpledge, leading from the Parish of Yate in the County aforesaid cross the faid Close called the Stub Riding unto and into a certain common Field called Horwood Common within the Precinct For stopping of the same Manor, and within the Pre- a Way.

cinct

cinct of the faid Leet, and the Jurisdiction of the Court of View of Frankpledge aforesaid, which before then there within the Jurisdiction of the Court-Leet aforefaid he had stopped up and straitened, and

the fame Way fo straitened and stopped up then and for the Space of three Months then last past had continued straitened and stopped up, to the common Nusance of the People of the faid Lord the King there by that Way defiring to pass; whereupon the faid N. Legg, the Occupier of the faid Close called the Stub Riding, for the Cause aforefaid, at and by the same Court of View of Frankpledge then and there was amerced; which faid Amercement by Affeerors then and there in the same Court of View of Frankpledge, to wit, N. White and T. Adey, Affectors in the same Court, thereto then charged and fworn, then and there was duly affeered to 40 s. and farther in the fame Court by the faid then Steward of the faid Court, and the Jurors aforefaid, it was order'd, that the faid N. Legg, being the Occupier of the Close aforesaid, Order to open should open and leave open the Way aforesaid for the Subjects of the Lord the now King there after to travel and pass

> before the 23d Day of May then next following, under the Penalty of 41. of lawful Money of England, to be forfeited to the Lord in Default thereof: And the same T. Stephens, R. Parker and R. Brooke farther say, that the said N. Legg afterwards,

Amercement affeered.

the Way.

to wit, the same Day, Year and Place last mentioned, had Notice of the Order afore- Notice. faid, and that he being as aforefaid the Occupier of the Close aforesaid called the Stub Riding, did not open the same Way for the liege Subjects of the faid Lord the King there to travel and pass at any Time before the faid 23d Day of May then next ensuing, according to the Form of the Order aforesaid, by Reason whereof at another Court of View of Frankpledge of the faid T. Stephens, R. Parker and J. Neale, held at Old Sodbury aforefaid within the Manor aforesaid, before the Steward aforesaid, within one Month next after the Feast of St. Michael, to wit, on the 23d Day of October in the 32d Year of the Reign of the faid Lord the King abovefaid, by the Oath of 12 other free and lawful Men, being then in the fame Court last mentioned, lawfully fworn and charged to inquire and present in Form aforesaid, it was in the same Court presented, that the Presentment, faid N. Legg, the Occupier of the Close that it was not aforesaid called the Stub Riding, had not opened. opened the fame Way for the liege Subjects of the Lord the now King there to travel and pass, according to the Form of the faid Order last mentioned in that Behalf fo as aforesaid then before for that Purpose made; and that by Reason thereof the faid N. Legg, the Occupier of the faid Close called the Stub Riding, had forfeited to the same T. Stephens, R. Parker and J. Neale,

Neale, the Lords of the Court aforefaid, and of the Manor aforesaid with the Appurtenances being then in Form aforesaid feised, the faid Sum and Penalty of the faid 41. of lawful Money of England: And the said T. Stephens, Robert Parker and Richard farther fay, that afterwards and before the faid Time when, &c. to wit, 28th Day of October in the 32d Year of the Reign of the faid Lord the now King, the said John Neale at Old Sodbury afore-

Death of one faid in the County aforefaid died, whereby of the Lords. not only the faid Manor with the Appurtenances came to the same T. Stephens and R. Parker by Right of Survivorship, but the Right of having the faid Amercement and Penalty accrued to them the faid Thomas and Robert: And the fame T. Stephens, Robert Parker and Richard farther fay, that at the Time of the feveral Prefentments and Courts aforesaid so as aforefaid held and made, the Way aforesaid was stopped and straitened, and so continued, by the faid N. Legg, the Occupier of the Close aforesaid, to the common Nusance of the Subjects of the said Lord the King; and because the faid Sum and Penalty of 4 l. above mentioned at the faid Time when, &c. was in Arrear and unpaid, altho' it was demanded of the faid N. Legg, to wit, at Old Sodbury aforesaid, the same T. Stephens and R. Parker in their own Right well avow, and the faid R. Broke, as Bailiff of the faid T. Stephens and

Avowry for Non-payment.

R. Parker, and by their Command, well acknowledges the Taking of the Cattle aforesaid, then being the Cattle of the said N. Legg at the faid Time when, &c. in the faid Place where, &c. for the faid Penalty of 47. being in Form aforefaid due

and in Arrear, and justly, &c.

And the faid Nicholas fays, that neither the faid Thomas and Robert the Taking of the Cattle aforefaid in the faid Place where, &c. for the Reason aforesaid before alledged ought to avow just, nor the faid Richard for the same Reason the same Taking in the same Place ought to acknowledge just, because by protesting that Bar, protesting there is not any fuch King's Highway as is there was no above fupposed, for Plea the same Nicho-such Way, las says, that the Way aforesaid was not says he did straitened and stopped by the faid Nicholas not stop it. in Manner and Form as the faid Thomas and Robert above by avowing, and the faid Richard above by acknowledging, have supposed: And this he is ready to verify: Wherefore for that the faid Thomas Stephens, Robert Parker and Richard Broke, the Taking of the Cattle aforefaid have above confessed, the same Nicholas prays Judgment, and his Damages by Realen of the Taking and unjust Detention of those Cattle, to be adjudged to him, &c.

And the faid Thomas Stephens, Robert Demurrer. Parker and Richard Broke say, that the Plea aforesaid by the said Nicholas above in Bar to the Avowry and Cognifance afore-

T 4 faid

faid above pleaded, and the Matter in the fame contained, are not fufficient in Law to preclude them the faid Thomas, Robert and Richard, from having their Avowry and Cognisance aforesaid, and that they to that Plea in Manner and Form aforefaid pleaded have no Necessity, nor are by the Law of the Land obliged in any Manner to answer: And this they are ready to verify: Wherefore for want of a fufficient Plea in this Behalf, the fame Thomas, Robert and Richard, as before pray Judgment, and a Return of the Cattle aforesaid. together with their Damages, Costs and Expences, by them about their Suit in this Behalf fustained, according to the Form of the Statute in fuch Case made and provided, to be adjudged to them, &c. And for Causes of Demurrer in Law, the same Thomas, Robert and Richard, according to the Form of the Statute in such Case 4 Ann. c. 16. lately made and provided, do set down, and to the Court here express the Causes following, to wit, because the Matter is traversed otherwise than it is alledged in the Declaration, whereby the Plaintiff is obliged to prove what he hath not alledged, and likewife because the Matter traversed is not traversable by the Laws of this Kingdom of England in the Manner in which it is traversed in the Plea.

The Causes.

27 El. c. 5.

Toinder in Demurrer.

And the faid Nicholas fays, that the Plea aforesaid by him the said Nicholas above in Bar to the Avowry and Cogni-

fance aforefaid above pleaded, and the Matter in the same contained, are good and fufficient in Law to preclude the faid Thomas, Robert and Richard, from having their Avowry and Cognisance aforesaid; which faid Plea, and the Matter in the fame contained, the faid Nicholas is ready to verify and prove, as the Court, &c. And because the said Thomas, Robert and Richard, do not answer to that Plea, nor the same hitherto in any wife deny, the fame Nicholas as before prays Judgment, and his Damages aforefaid by Reason of the Taking and unjust Detention of the Cattle aforesaid, to be adjudged to him, &c. But because the Court of the faid Lord the King here are not yet advised to give their Judgment of and upon the Premisses, Day therefore is given to the Parties aforefaid before the Lord the King from the Day of St. Michael in three Weeks wherefoever, &c. to hear their Judgment of and upon the Premisses, because the Court of the faid Lord the King here thereof not yet, &c.

Ingram and Hale at the Suit of Fletcher.

M. 7 W. 3. Roll 107.

Stafford, to wit. Joseph Ingram and John Declaration.

Hale were summoned to answer to James Fletcher in a Plea, why they took a Cow of him the said James and

and unjustly detained it, against Surety and Pledges, &c. And whereon the faid Fames by John Lilly his Attorney complains, that the faid Joseph and John on the 20th Day of February in the 7th Year of the Reign of the Lord William the Third, now King of England, &c. at Shenston in the County aforefaid, in a certain Place there called the Lane, took the Cow aforesaid of him the faid James and unjustly detained it, against Surety and Pledges, until, &c. whereby the faid James lays that he is prejudiced, and hath Damage to the Value of 20 l. And therefore he produces the Suit, &c.

Cognisance for a Fine at a Court-Leet.

And the faid Joseph and John Hale by for a Distress Thomas Callowe their Attorney come and defend the Force and Injury when, &c. and as Bailiffs of Rowland Fryth, Gent. well acknowledge the Taking of the Cow aforesaid in the said Place in which, &c. and justly, &c. because they fay, that the same Place in which the Taking of the Cow aforesaid is supposed to be contains, and at the faid Time when the Taking of the Cow aforesaid is supposed to be, contained in itself an Acre of Land with the Appurtenances in Shenston aforesaid; which faid Town of Shenston is, and at the said Time when, &c. and also from Time out of Mind was, within the Manor of Shenston with the Appurtenances in the County Beisin in Fee. aforesaid; of which said Manor with the Appurtenances the faid Rowland is, and

at the faid Time when, &c. and long before was, feifed in his Demefne as of Fee; and the faid Rowland, and all those whose Prescription estate he hath in the same Manor with the for a Court-Appurtenances, for Time out of Mind Leet. have had, and been accustomed to have, a Court-Leet or View of Frankpledge of the fame Manor, and whatever to View of Frankpledge belongs, of all the Inhabitants and Refiants of that Manor, before the Steward of the same Court for the Time being, every Year within a Month next after the Feast of St. Michael the Archangel, at that Manor yearly to be held, as to the fame Manor with the Appurtenances belonging: And the fame 70- Custom to sepb and John farther fay, that within the choose a Con-Manor aforesaid there is, and from Time out of Mind hath been, fuch Custom, that the Jurors to inquire and present those Things, which to that Court-Leet and View of Frankpledge belong, charged and fworn, at the Court of View of Frank pledge of the Manor aforefaid, held at that Manor within a Month next after the Feaft of St. Michael the Archangel, yearly have chosen, and for all the Time aforefaid have been accustomed to choose, a proper Man from the Inhabitants within the Manor aforesaid to be Constable of the Constablewick of Shenston aforesaid, to serve for one Year in that Office; which Objected, that faid Man so elected hath taken upon him- it should be self, and for all the Time above said hath for one Year next enfuing. been

been used and accustomed to take upon himself that Office, and hath taken and been accustomed to take an Oath for the

due Execution of that Office, under a reasonable Penalty, for all the Time abovefaid, by the Jurors aforefaid at fuch Court-

Leet and View of Frankpledge in that A Court-Leet Behalf fet: And the same Joseph and John farther fay, that the faid Rowland being

Lord of the Manor aforesaid, and of the fame in Form aforefaid feised, at a Court-Leet or View of Frankpledge of that Manor, held at that Manor within a Month next after the Feast of St. Michael the

Archangel, to wit, on the ninth Day of October in the fifth Year of the Reign of the Lord William now King and the Lady

Mary late Queen of England, &c. before Henry Fryth, Gent. then Steward to the faid Rowland of that Court, the faid James

Fletcher then and long before being an inhabitant within the Manor aforesaid at

Shenston aforesaid, and a proper Man to be Constable of the faid Constablewick of

Shenston aforesaid, by E. Thornton, T. Grace, 7. C. 7. A. 7. H. W. M. W. R. N. W.

T. S. J. M. J. S. J. A. and J. D. good and lawful Men, and inhabiting within the

Manor aforesaid, and then and there in the fame Court charged and fworn to inquire

and present those Things which to that Court-Leet and View of Frankpledge be-

The Plaintiff longed, duly and according to the Custom elected Con- aforesaid was chosen to be Constable of the

Constable-

held.

Rable.

Constablewick of Shenston aforesaid for one Year then next enfuing to serve in that Office; and those Jurors then and there in The Order of the same Court ordered, that the said the Jury. James should take his Oath for the due The Penalty Execution of his Office aforesaid, under ving. the Penalty of forfeiting 40 s. whereof the faid James Fletcher immediately afterwards, to wit, the same Day and Year there had Notice: \* Nevertheless the said James hath \* The Chief not taken his Oath for the due Execution Justice held of the Office of Constable aforesaid, nor this to be hath executed or taken upon himfelf that naught; for Office, but to do it then and often after-faid he, they wards there absolutely refused; wherefore should only elect him, and afterwards and before the faid Time when, he should have &c. to wit, at a Court-Leet or View of Notice of such Frankpledge of the faid Manor of the faid Election, and Rowland, held at that Manor within a if he did not Month next after the Feast of St. Michael thereupon go to a Justice of the Archangel, to wit, on the 11th Day of Peace to be October in the 6th Year of the Reign of sworn, he the faid Lord King William and the Lady should be pre-Mary, late Queen of England, before Henry fented for this Fryth then Steward to the said Rowland of next Court, that Court, by Edward Thornton, J. C. and should be amerced, and

the Amercement affeer'd. The Court also held it naught for not laying the Notice more particular, as that he was present in Court, or that he had Notice given that he was elected Constable, and required to take an Oath before a Justice of Peace. A second Presentment prout per Record, &c. The Fine not paid. Note; It is said in a Case in Moore, That the Bailists should have had a Warrant from the Court of t

from the Steward to distrain.

W.P. T.G. T.G. J.P. J.J. E.H. T.S. J. M. W. M. G. H. J. S. the Younger, and J. A. good and lawful Men then inhabiting within the Manor aforesaid, then and there in the fame Court fworn and charged to inquire and present those Things which to that Court-Leet or View of Frankpledge belonged, it was presented, that the said James Fletcher, because he was duly elected to be Constable of the Constablewick of Shenston aforesaid at the last Leet held for the Manor aforesaid, and under the Penalty of 40 s. on him fet, was ordered to take upon himfelf that Office, and execute it, and take his Oath in Form aforefaid for the due Execution of that Office; which, or any Part whereof, he had not done, wherefore he had forfeited to the Lord of the Manor aforesaid the said 40 s. of the Penalty aforesaid, then to be paid to the Lord of the Manor aforesaid, as by the Record thereof in the Custody of the said Steward of the Court of the Manor of him the faid Rowland at that Manor remaining more fully appears: And because the said 40 s. for that Penalty to the same Rowland, fo as aforesaid being Lord of the Manor aforefaid, at the faid Time when, &c. were in Arrear and unpaid, the fame Joseph and John Hale, as Bailiffs of him the said Rowland, well acknowledge the Taking of the Cow aforesaid in the said Place in which, &c. and justly, &c. for the same 40s. for the Penalty or Amercement aforefaid

faid to the faid Rowland so being in Arrear and unpaid, and within the Manor afore-faid, &c.

And the faid James fays, that by any Demurrer. Thing by the faid Joseph and John above in the Cognisance aforesaid by pleading alledged, the same Joseph and John the Taking of the Cow aforefaid in the faid Place in which, &c. ought not to acknowledge just, because he says, that the Plea aforesaid by them the said Joseph and John in Manner and Form aforefaid above pleaded, and the Matter in the fame contained, are not fufficient in Law to acknowledge the Taking of the Cow aforefaid in the faid Place in which, &c. just, and that he to that Cognifance in Manner and Form aforesaid made and pleaded hath no Neceffity, nor is by the Law of the Land obliged, to answer: And this he is ready to verify: Wherefore for want of a fufficient Plea in this Behalf the same James prays Judgment, and his Damages by Reason of the Taking and unjust Detention of the Cow aforefaid, to be adjudged to him, &c.

And the faid Joseph and John say, that Joinder in Dethe Plea aforesaid by them the said Joseph murrer. and John in Manner and Form aforesaid above pleaded, and the Matter in the same contained, are good and sufficient in Law for them the said Joseph and John to acknowledge the Taking of the Cow aforesaid in the said Place in which, &c. just;

which

which faid Plea, and the Matter in the fame contained, they the faid Joseph and John are ready to verify and prove, as the Court, &c. And because the said James hath not pleaded or answered to that Cognisance, nor hitherto any way denied it. the same Joseph and John pray Judgment, and a Return of the Cow aforefaid, together with their Damages, Costs and Charges, according to the Form of the Statute in fuch Case made and provided, to be adjudged to them, &c. But because the Court of the faid Lord the King now here are not yet advised to give their Judgment of and upon the Premisses, Day therefore is given to the Parties aforesaid before the Lord the King until wherefoever. &c. to hear their Judgment of and upon those Premisses, because the Court of the faid Lord the King now here thereof not yet, &c.

Sylas Titus, Esq; against Parkins, Knt.

Declaration.

Hertford, to wit. William Parkins late of Bushey in the County aforesaid, Knt. was summoned to answer to Sylas Titus, Esq; in a Plea, why he took the Cattle of him the said Sylas and unjustly detained them, against Surety and Pledges, &c. And whereon the same Sylas by John Warburton his Attorney complains, that the said William on the 18th Day of May in the first Year of the Reign of the Lord

Lord James the Second, now King of England, &c. at Bushey, in a certain Place there called Marrybill Ground, the Cattle of him the said Sylas, to wit, 36 wether 3 Lev. 225. sheep, 12 ewe sheep and 8 lambs, took and unjustly detained them, against Surety and Pledges until, &c. whereby the same Sylas says that he is prejudiced, and hath Damage to the Value of 10 l. And therefore he produces the Suit, &c.

And the faid William by Randal Baldwin Avowry and his Attorney comes and defends the Force Cognisance and Injury when, &c. and the fame Wil-for Damageliam in his own proper Right well avows, and as Bailiff to Algernon Earl of Effex, well acknowledges the Taking of the Cattle aforefaid in the faid Place in which, &c. and justly, &c. because he fays, that the fame Place, in which the Taking of the Cattle aforesaid is supposed to be, contains, and at the faid Time, when the Taking of the Cattle aforesaid is supposed to be, did contain in itself two Acres of Pasture with the Appurtenances in Bushey aforesaid; which faid two Acres of Pasture with the Appurtenances are, and at the faid Time when, &c. were, the Soil and Freehold of them the faid William and Algernon Earl of Essex; and because the Cattle aforesaid at the faid Time when, &c. were in the faid two Acres of Pasture eating up the Grass in the fame then growing, and doing Damage there, the same William in his own proper Right well avows, and as Bailiff to the

the faid Algernon Earl of Effex, well acknowledges the Taking of the Cattle aforefaid in the faid Place in which, &c. and justly, &c. so doing Damage there, &c.

Bar, that the Copyhold held of the Manor of Bufbey, &c.

terrents (

And the faid Sylas fays, that the faid locus in quo is William, for the Reason before alledged. the Taking of the Cattle aforesaid in the faid Place in which, &c. ought not in his own proper Right to avow, and as Bailiff of the faid Earl to acknowledge just, because he says, that the said two Acres of Pasture in which, &c. are, and at the said Time when, &c. and also from Time immemorial were, Parcel of the Manor of Bulbey and Customary Land of the same Manor, and demifed and demifeable by Copy of Court-Roll of that Manor, by the Lord or Lords of the same Manor, or by their Steward of the Court of that Manor for the Time being, to any Person or Persons willing to take them in Feesimple, or otherwise, at the Will of the Lord or Lords, according to the Custom That the De of the Manor aforefaid: And the fame fendant being Sylas farther fays, that the faid Earl and William before the faid Time when, &c. to wit, on the 21st Day of April in the first Year of the Reign of the faid Lord the now King abovefaid, were lawfully Lords of the Manor aforesaid; and the faid Earl and William, being then Lords of the Manor aforesaid, the same Earl and William afterwards and before the faid Time when, &c. to wit, on the same 21st Day

Lord of the Manor, granted it to the Plaintiff in Fee, according, &c.

Day of April in the first Year abovefaid. at a Court of them the faid Earl and William, of their Manor aforefaid, then held for that Manor within the Manor at Bufbey aforesaid in the County of Hertford, by one Thomas Smith, Gent. then their Steward of the Court of their Manor aforesaid, by Copy of Court-Roll of that Manor granted the faid two Acres of Pasture with the Appurtenances in which, &c. among other Things, to the faid Sylas; To have and to hold to the fame Sylas, his Heirs and Affigns for ever, at the Will of the Lords, according to the Custom of the Manor aforefaid; and the fame Sylas, according to the Custom of the Manor aforefaid, then and there was admitted Tenant thereof: By Virtue of which faid Grant and Admission, the same Sylas before the said Time when, &c. into the faid two Acres of Pasture with the Appurtenaces in which, &c. among other Things, entred, and was and yet is thereof feifed in his Demefne as of Fee, at the Will of the Lords, according to the Custom of the Manor aforesaid; and he the faid Sylas being fo thereof feifed, and he being the fame Sylas before the faid Time when, feifed put in &c. put his Cattle aforesaid into the said his Cattle, two Acres of Pasture in which, &c. to feed on the Grass there then growing, and those Cattle were in the faid two Acres of Pasture in which, &c. feeding on the Grass and the Dethere then growing, until the faid William fendant di-Parkins on the faid 18th Day of May in strained them.

II 2

the first Year abovesaid, at Bushey aforesaid, in the said two Acres of Pasture called Marrybill Grounds, in which, &c. took the same Cattle of the said Sylas and unjustly detained them, against Surety and Pledges, until, &c. as the same Sylas above against him complains: And this he is ready to verify: Wherefore for that the said William Parkins the Taking of the Cattle aforesaid hath above confessed, the same Sylas prays Judgment, and his Damages by Reason of the Taking and unjust Detention of those Cattle, to be adjudged to him, &c.

Repl. That the Land is held of the Manor of B.

And the faid W. fays, that well and true it is, that the faid two Acres of Pasture with the Appurtenances in which, &c. are, and at the faid Time when, &c. and also from Time immemorial were, Parcel of the faid Manor of Bushey, and Customary Lands of the same Manor, and demised and demiseable by Copy of Court-Roll of that Manor, by the Lord or Lords of the fame Manor, or by their Steward of the Court of that Manor for the Time being, to any Person or Persons willing to take them in Fee-simple, or otherwise, at the Will of the Lord or Lords, according to the Custom of the Manor aforesaid; and that the faid Earl and W. before the faid Time when, &c. to wit, the faid 21st Day of April in the first Year of the Reign of the faid Lord the now King abovefaid, were lawfully Lords of the Manor aforesaid; and

and that the faid Earl and W. then being Lords of the Manor aforefaid, the fame Earl and W. afterwards and before the faid Time when, &c. to wit, on the faid 21st Day of April in the first Year abovesaid, at Bushey aforesaid in the County of Hertford aforesaid, by the said T. Smith, then their Steward of the Court of their Manor aforefaid, by Copy of Court-Roll of that Manor Grant by granted the faid two Acres of Pasture with Copy. the Appurtenances in which, &c. among other Things, to the same Sylas; To have and to hold to the fame Sylas, his Heirs and Assigns for ever, at the Will of the Lords, according to the Custom of the Manor aforesaid; and that the said Sylas, according to the Custom of the Manor aforefaid, was then and there admitted Tenant thereof; and that by Virtue of the Grant and Admission aforesaid, he the said Sylas before the faid Time when, &c. into the faid two Acres of Pasture with the Appurtenances among other Things entred, and was thereof feifed in his Demefne as of Fee at the Will of the Lords, according to the Custom of the Manor aforesaid, as the faid Sylas above by pleading hath alledged: But the faid W. Parkins farther fays, that the faid two Acres of Pasture with the Appurtenances in which, &c. together with the other Lands and Tenements in the fame Copy mentioned, and by the same Copy to the faid Sylas and his Heirs granted, and to which the faid Sylas

The yearly Value.

was as aforefaid admitted, at the faid Time of the Admission of the said Sylas to the fame, were and yet are of the clear yearly Value of 28 l. and that the faid Earl and W. by the faid T. Smith in the faid full Court of the Manor aforefaid, held within that Manor on the faid 21st Day of April in the first Year of the Reign of the faid Lord the now King abovefaid, he the faid T. Smith, being then Steward as aforefaid of the faid Earl and W. then Lords of the Manor aforesaid, of the said Court of their Manor aforesaid, after the said Admission of the faid S. Titus to the faid two Acres in which, &c. and the faid other Lands and Tenements by the Copy aforesaid made to the faid Sylas granted, then and there did affess and appoint the Sum of 35 l. for the Fine for the faid Grant to the faid Sylas of the faid two Acres of Pasture with the Appurtenances in which, &c. and the other Lands and Tenements aforesaid, by the Copy aforesaid in Form aforesaid granted, to be paid by him the faid Sylas to the faid Earl and W. being as aforefaid Lords of the Manor aforesaid, on the first Day of May then next enfuing at the Porch of the Parish Church of Bushey aforesaid in the faid County of Hertford; and that the faid Sylas then and there, to wit, at the Manor aforesaid, of all and singular the Premisses had Notice: And the faid W. farther fays, that the Fine aforesaid for the Lands and Tenements by the Copy aforefaid in Man-

The Fine.

ner and Form aforesaid granted to the said Sylas was a reasonable Fine; and that the faid S. Titus, altho' he had Notice from the faid Lords of the Manor aforesaid, at the Court aforesaid held as aforesaid at the Manor aforesaid, on the said 21st Day of April aforesaid, of the Premisses aforesaid, did not pay to the faid Earl and W. Lords of the Manor aforefaid, or either of them, the faid Sum of 35 1. for the Fine aforefaid in Form aforesaid affeffed, on the said first Day of May then next ensuing the Admission of him the said Sylas at the said Porch of the Parish Church of Bushey aforesaid, but the same 35 l. to the said Forseiture for Earl and W. then and there absolutely de- Non paynied and refused, and yet doth refuse, to ment.

pay; whereby the same S. T. hath forfeited an uncertain to the said Earl and W. being as aforesaid Fine is no the Lords of the Manor aforesaid, whereof, Forseiture. &c. all his customary Right, Estate, Title Raym. 42. and Interest aforesaid, of and in the faid There pught two Acres of Pasture with the Appurte- to be a Denances in which, &c. and the faid other mand. Lands and Tenements in the Grant afore- Cro. El. 779faid specified; after which said Forfeiture Cro. Jac. 617. in Form aforesaid made, and before the faid Time when, &c. the faid Earl and W. being as aforefaid Lords of the Manor aforesaid, into the said two Acres of Paflure with the Appurtenances in which, &c. entred, and were and yet are thereof feised in their Demesne as of Fee; and because the Cattle aforesaid after the Entry afore-U 4

aforefaid, to wit, at the faid Time when, &c. were in the faid two Acres of Pasture with the Appurtenances in which, &c. eating up the Grass in the same then growing, and doing Damage there, the same W. as before in his own proper Right well avows, and as Bailiff to the faid Earl well acknowledges the Taking of the Cattle aforesaid in the said Place in which, &c. and justly, &c. so doing Damage there: And this he is ready to verify: Wherefore as before he prays Judgment, and a Return of the Cattle aforesaid, together with his Damages, Costs and Expences by him about his Suit in this Behalf sustained, ac-

21 H. 8. c. 19. cording to the Form of the Statute in such Case thereof lately made and provided, to

be adjudged to him, &c.

Protesting the a Custom to pay a Year's Value only.

And the faid Sylas by protesting that the Fine is unrea- Sum aforesaid of 35 l. for the Fine aforefonable, pleads faid for the faid Lands and Tenements by the Copy aforesaid to the said Sylas in Manner and Form aforefaid granted was not a reasonable Fine, as the said W. above by pleading hath alledged, for Plea the fame Sylas fays, that within the Manor aforesaid there is, and from Time immemorial hath been, fuch Cuftom used and approved within that Manor for all the Time aforesaid, to wit, that every Person or Persons who should be admitted Tenant or Tenants to any customary Lands or Tenements of that Manor by Copy of Court-Roll of that Manor, hath and have been and

and ought to pay to the Lord or Lords of the fame Manor for the Time being, for a Fine for his or their Admission to such customary Lands or Tenements, so much Money as those Lands or Tenements were worth by the Year at the Time of fuch Admission, and no more: And the faid The Lands Sylas in Fact fays, that the faid two Acres worth but of Pasture with the Appurtenances in which, 28 l. per Ann. &c. together with the other Lands and fered to pay. Tenements in the fame Copy mentioned, and by the same Copy to the said Sylas and his Heirs granted, and to which the faid Sylas was as aforefaid admitted, at the Time of the Admission of the said Sylas to the fame were worth, and yet are worth, by the Year 28 L and no more: And the fame Sylas farther fays, that at the Time of his Admission to the Tenements aforefaid with the Appurtenances, to wit, at the faid Court of the Manor, held within that Manor on the faid 21st Day of April in the first Year abovesaid, he was ready and offered to pay to the said W. then one of the Lords of that Manor, being then and there present in his proper Person, so much Money as the faid customary Tenements with the Appurtenances were worth by the Year at the Time of the Admission of him the faid Sylas to the fame, to wit, 28 l. of lawful Money of England; which faid 28 l. the faid W. then and there absolutely refused to receive or accept of the same Sylas: And this he is ready to verify: Where-

Wherefore as before he prays Judgment, and his Damages by Reason of the Taking and unjust Detention of the Cattle aforefaid, to be adjudged to him, &c.

Demurrer.

And the faid W. fays, that the Plea of the faid Sylas above in rejoining pleaded, and the Matter in the fame contained, are not fufficient in Law to preclude him the faid W. from having his Avowry and Cognifance aforefaid, and that he to that Plea in Manner and Form aforefaid pleaded hath no Necessity, nor is by the Law of the Land obliged, to answer: And this he is ready to verify: Wherefore for want of a sufficient Plea in this Behalf, the same W. as before prays Judgment, and a Return of the Cattle aforesaid, together with his Damages, Costs and Expences by him about his Suit in this Behalf sustained, according to the Form of the Statute in such Case thereof lately made and provided, to be adjudged to him, &c. And for Cause of Demurrer in Law to that Plea, the fame W. according to the Form of the Statute in fuch Cafe thereof lately made and provided, fets down, and to the Court here expresses this Cause following, to wit, that the Value of the Land remains in Estimation, and the Custom aforesaid by the faid Sylas above in pleading pretended and alledged is incertain, infufficient and void in Law.

The Caufe.

27 El. c. 5. 4 A. c. 16.

And the faid Sylas, for that he hath Joinder in De above alledged sufficient Matter in Law murrer. in his Plea aforefaid above in rejoining pleaded to preclude the faid W. from having his Avowry and Cognisance aforesaid, which he is ready to verify, which faid Matter the faid W. doth not deny, nor thereto in any wife answer, but altogether refuses to admit that Averment, as before prays Judgment, and his Damages by Reason of the Taking and unjust Detention of the Cattle aforefaid, to be adjudged to him, &c. And because the Justices here will advise themselves of and upon the Premisses before they give Judgment thereon. Day therefore is given to the Parties aforesaid here until on the Octave of St. Hillary to hear their Judgment thereon, because the same Justices here thereof not yet, &c. On which Day here comes as well the faid Sylas as the faid W. by their Attornies aforefaid; and hereupon the Pre- Judgment for misses being seen, and by the Justices here the Plaintiff. more fully understood, it seems to the said Justices here, that the said Plea of the said Sylas above in rejoining pleaded, and the Matter in the same contained, is sufficient in Law to preclude him the faid W. from having his Avowry and Cognifiance aforefaid, as the faid Sylas hath above alledged; wherefore the faid Sylas ought to recover his Damages against the faid W. by Reason of the Taking and unjust Detention of the Cattle aforesaid: But because it is unknown

Inquiry awarded.

known what Damages the faid Sylas hath fustained by Reason of the Taking and unjust Detention of the Cattle aforesaid, the Sheriff is commanded, that by the Oath of good and lawful Men of the County aforesaid he diligently inquire what Damages the faid Sylas hath fuftained, as well by Reason of the Taking and unjust Detention of those Cattle, as for his Costs and Charges by him about his Suit in this Behalf fustained; and the Inquisition which he shall thereof make, he certify here from the Day of Easter in 15 Days, under the Seal, &c. and the Seals, &c. On which Day here comes the faid Sylas by his Attorney aforefaid; and the Sheriff, to wit, Joseph Edmunds, Esq; hath now returned here a certain Inquisition taken before him at Stevenage in the County aforefaid on the 15th Day of April last past, by the Oath of 12, &c. whereby it is found that the faid Sylas hath fustained Damage by Reason of the Taking and unjust Detention of the Cattle aforefaid, beside his Costs and Charges by him about his Suit in this Behalf expended, to four Pence, and for Signed 3 May those Costs and Charges to 6 d. Therefore it is considered, that the said Sylas do recover against the faid William his Damages aforesaid to 10 d. by the Inquisition aforefaid in Form aforesaid found, and also 9 l. 5 s. 2 d. to the same Sylas, at his Request, for his Costs and Charges aforesaid, by the Court here of Increase adjudged; which

2 Jac. 2.

which faid Damages in the Whole amount to 9 l. 6 s. And the faid William in Mercy, &c.

This Judgment was affirmed on a Writ of

Error.

A ND the faid C. by R. B. his Attorney, An Avowry I comes and defends the Force and In- for Damagejury when, &c. and well avows the Taking Feafant in the Defendant's of the faid Cattle in the faid Place where, Freehold. &c. to be just, because he saith, That the faid Place doth, and at the faid Time when, &c. did contain in itself ten Acres of Land with the Appurtenances; which ten Acres of Land with the Appurtenances are, and at the Time of taking the Cattle aforefaid were the Soil and Freehold of the faid C. and because the Cattle aforesaid, at the said Time when, &c. were in the said Place, where feeding upon the Grass there growing, and doing Damage there, the faid C. well avows the Taking of the Cattle aforesaid, in the said Place where, &c. and justly, &c. for the Damage there so done as aforefaid.

And the faid (Plaintiff) faith, That the faid C. ought not to avow the Taking of the Cattle aforesaid in the said Place where, &c. to be just, because he saith, That the said ten Acres with the Appurtenances are, and at the said Time when, &c. were the Soil and Freehold of the said (Plaintiff) and not the Soil and Freehold of the said C. as the said C. hath above alledged;

and

and this he prays may be inquired of by Pl. Gen. 574, the Country; and the faid C. does likewife the fame. 575.

Pippin and another at the Suit of Were And Wanson A sid Maynard.

that went reas afarmed on a

Trin. 12 W. 3. in C. B.

Declaration in Replevin for the Taking of the Plaintiff's Cattle.

The Defendants plead Property in a Stranger, and for a Return make Cognifance as Bai-B. for Damage-Feafant in their Freehold.

and In-ter Denries

Pealancing! Defendant

A ND the faid Edward and Sarah by M. L. their Attorney come and defend the Force and Injury when, &c. and fay, that at the Time when the Taking of the Cattle aforefaid is supposed to be, the Property of those Cattle was in one Stephen liffs to A. and Hewes, who is now furviving and in full Life, to wit, at H. aforefaid in the County aforefaid; without that, that the Property of the Cattle aforesaid at the Time of the Taking of them was in the faid Jonathan Maynard, as he by his Writ and Declaration aforesaid above supposes: And this they are ready to verify: Wherefore they pray Judgment of the Writ-and Declaration aforefaid, and a Return of the Cattle aforesaid, to be adjudged to them, &c. And to have a Return of the Cattle aforefaid, the same Edward and Sarab, as Bailiffs of A. B. and C. B. well acknowledge the Taking of the Cattle aforefaid in the faid Place where, &c. called Hebrom, and justly,

justly, &c. because they say, that the same Place called Hebrom contains, and at the faid Time when the Taking of the Cattle aforesaid is supposed to be, did contain in itself 40 Acres of Pasture with the Appurtenances in King sthorpe in the County aforesaid; which said 40 Acres of Pasture with the Appurtenances are and at the faid Time when, &c. were the Soil and Freehold of the faid A. B. and C. B. And because the Cattle aforesaid at the said Time when, &c. were in the faid Place called Hebrom aforefaid, eating up the Grass there then growing, and doing Damage there, the same Edward and Sarab, as Bailiffs of the faid A. B. and C. B. well acknowledge the Taking of the Cattle aforesaid in the faid Place where, &c. and justly, &c. fo doing Damage there: Wherefore they pray Judgment, and a Return of the Cattle aforesaid, to be adjudged to them, &c.

And the said Jo. Maynard says, that his Repl' and Is-Writ and Declaration aforesaid ought to be quashed, because he says, that the Property. Property of the Cattle aforesaid at the said Time of the Taking of them was in the said Jonathan Maynard in Manner and Form as he by his Writ and Declaration aforesaid hath above thereof alledged, to wit, at Hebrom aforesaid in the County aforesaid. And this he prays may be inquired of by the Country: And the said Edward and Sarah likewise: Therefore the Sheriff is commanded that he cause to come, &c.

AND.

My, Wa because they fare the flane

Where the Defendant pleads Property as to Part, and Non Residue.

ND the faid R. by R. B. his Attorney, comes and defends the Force and Injury when, &c. and as to the Taking of ten Sacks of Flower, Part of the cepit as to the Goods and Chattels aforesaid, he the said R. faith, That the Property of those Goods and Chattels at the faid Time when, &c. were in the faid R. and not in the faid T. as it is above supposed by the Writ aforefaid; and this he is ready to verify; whereupon, as to the Taking and Detaining of those Goods and Chattels, the said R. prays Judgment of the Writ aforesaid, and that it may be quashed, &c. And as to the Taking of the Refidue of the Goods and Chattels aforefaid, he the faid R. pleads, that he did not take those Goods and Chattels, the faid Residue, as the said T. doth above complain against him; and thereof he puts himself upon the Country; and the faid T. does likewise the same.

And the faid T. as to the faid Plea of the faid R. above pleaded to quash the Writ aforesaid faith, That his said Writ ought not to be quashed by Reason of any Thing above alledged, because he faith, That the Property of the Goods and Chattels aforesaid above specified in the said Plea, at the Time of taking those Goods and Chattels, was in the faid T. as he doth above suppose by his Writ aforesaid; and this he prays may be inquired of by the Country; and the faid R. does likewife the

the same: Therefore as well to try that Issue, as the said other Issue above joined, the Sheriff is commanded, that he cause Pl. Gen. 602. to come here twelve, &c.

Note; Upon pleading Non cepit on a Claim of Property, the Defendant shall have his Goods again. Salk. 581.

↑ ND the faid W. by H. S. his Attorney Cognifance as Comes and defends the Force and In-Bailiff for a jury when, &c. and as Bailiff of M. G. Rent-Charge. well acknowledges the Taking of the Cattle aforesaid in the said Place where, &c. and justly, &c. because he says, that the fame Place, in which the Taking of those Cattle is supposed to be, contains, and at the faid Time when the Taking of those Cattle is supposed to be, did contain in itself 40 Acres of Land with the Appurtenances in L. aforefaid, and that long before the said Time when, &c. the said F. was feifed of the faid 40 Acres of Land with the Appurtenances, whereof the Place where, &c. is Parcel, in his Demesne as of Fee, and the faid 40 Acres of Land held of the faid M. as of his Manor of B. in the County of S. aforesaid, by Fealty. Suit of Court, and the Rent of 12 s. 6 d. every Year, at the Feast of St. Michael yearly to be paid; of which Services the faid M. was seised by the Hands by the faid F. as by the Hands of his very Tenant, to wit, of the Fealty and Suit of X Court,

Court, and of the Rent aforesaid in his Demeine as of Fee; and because 51. 12 d. 6d. of the Rent aforesaid, for nine Years ended at the Feast of St. Michael in the 26th Year of the Reign of the faid Lord the now King, to the fame M. at the faid Time when, &c. were in Arrear and not paid, the fame W. as Bailiff of the faid M. well acknowledges the Taking of the Cattle aforesaid in the said Place where, &c. and justly, &c. for the same five Pounds twelve Shillings and fix Pence fo in Form aforefaid being in Arrear, as in Parcel of the faid Land of the faid M. in Form aforesaid held, and within the Fee, &c. And this he is ready to verify: Wherefore he prays Judgment, and a Return of the Cattle aforesaid, to be adjudged to him, &t.

Bar, that he Gr.

And the faid F. fays, that the faid M. was not feised, was not seised of the Services aforesaid by the Hands of him the faid F. as by the Hands of his very Tenant, as the faid W. g hath above alledged: And this he is ready to verify: Wherefore for that the faid W. the Taking of the Cattle aforesaid in the faid Place where, &c. hath above acknowledged, the same F. prays Judgment, and his Damages by Reason of the Taking and unjust Detention of the Cattle aforesaid, to be adjudged to him, &c.

Iffue thereon.

And the faid William (as before) fays, that the faid M. was feifed of the Services aforesaid by the Hands of the said F. as by

by the Hands of very Tenant, as he hath above alledged: And of this he puts himfelf upon the Country: And the faid F. likewife, &c. Therefore the Sheriff is commanded, that he cause to come here from the Day of the Holy Trinity in three Weeks 12, &c. by whom, &c. and who peither, &c. to recognize, &c. becaufe as well, &c.

## Liddiard and Crefwicke.

## M. 33 C. 2.

ND the faid Francis by Andrew Innys Avowry for his Attorney comes and defends the Damage-Fea-Force and Injury when, &c. and well fant in his avows the Taking of the Cattle aforefaid Freehold. in the faid Place in which, &c. and justly, &c. because he says, that the same Place in which, &c. is known, and at the faid Time when, &c. and long before was known, as well by the Name of Hannam's Common, as by the Name of Hannam's Heath, and contains, and at the faid Time when, &c. contained in itself 50 Acres of Pasture with the Appurtenances in the faid Parish of Bitton in the said County of Gloucester, which said 50 Acres of Pasture with the Appurtenances are, and at the said Time when, &c. were the Soil and Freehold of him the said Francis; and because the Cattle aforesaid at the said Time when, &c. were in the faid Place in which, X 2

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&c. eating up the Grass there then growing, and doing Damage there, the same Francis in his own proper Right well avows the Taking of the Cattle aforefaid in the faid Place in which, &c. and justly, &c. fo doing Damage there: And this he is ready to verify: Wherefore he prays Judgment, and a Return of the Cattle aforefaid. together with his Damages, Costs and Charges, in this Behalf fustained, according 21H. 8. c. 19. to the Form of the Statute in fuch Cafe

lately made and provided, to be adjudged to him, &c.

Bar, That T. M. was seised in Fee, and demised to W. L. and the Plaintiff

And the faid John Liddiard fays, that the faid Francis, for the Reason before alledged, the Taking of the Cattle aforesaid in the faid Place in which, &c. ought not to avow just, because by protesting that fortheir Lives. the same Place in which, &c. at the said Time when, &c. was not the Freehold of him the faid Francis, as is above supposed, for Plea the same John says, that long before the faid Time of the Taking of the Cattle aforesaid in the said Place in which, &c. to wit, on the 21st Day of August in the 10th Year of the Reign of the Lord James, late King of England, &c. Theodore Newton, Knt. was seifed in his Demesne as of Fee of and in one Messuage and 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances in Hannam and Bitton in the Parish of Bitton aforesaid in the County aforesaid; and being fo thereof feifed, afterwards, to wit, on

on the faid 21st Day of August in the 10th Year of the Reign of the Lord James, late King of England abovefaid, at Bitton aforefaid in the County aforefaid, demised the Meffuage aforefaid and the faid 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, to William Liddiard and Katherine his Wife, and him the faid John Liddiard; To hold to the faid William Liddiard and Katherine his Wife for and during the Term of their natural Lives, and the natural Life of the longer Liver of them, and after their Decease the Remainder thereof to the faid John Liddiard for and during the Term of the natural Life of him the faid John: By Virtue of which faid Demise the same William and Katherine afterwards of the faid Meffuage and the faid 47 Acres and a half of Land Arable, Meadow and Pasture with the Appurtenances, were feifed in their Demesne as of Freehold for the Term of their Lives and the Life of the longer Liver of them, the Remainder thereof after their Decease to the faid John for the Term of his Life so as aforesaid belonging; and the said William and Katherine being so thereof feised afterwards, to wit, on the first Day of September in the 32d Year of the Reign of the Lord Charles the Second, now King of England, &c. at Bitton aforesaid in the County aforefaid died thereof feifed; after the Death of which faid William and Katherine he the faid John, as in his Remainder X 3

mainder aforesaid, afterwards, to wit, on the faid first Day of September in the gad Year of the Reign of the Lord Charles the Second, now King of England, Edo. at Bitton aforesaid in the County aforesaid into the Meffuage aforefaid and the faid 47 Acres and a half of Land Arable,

the Plaintiff.

Prescription for Common.

Meadow and Pasture, with the Appurte-The Entry of nances, by Virtue of the Demise aforesaid entred, and was and is yet thereof feifed in his Demesne as of Freehold for the Term of his Life: And the same John farther fays, that at the Time of the Demile aforesaid made, he the said Theodore Newton, and all those whose Estate the fame Theodore then had of and in the faid Meffuage and 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, have had, and for Time out of Mind have been accustomed to have, for themselves, their Farmers and Tenants, of the faid Meffuage and the faid 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, common of Pasture in the said Place in which, &c. for all their commonable Cattle in and upon their Tenements aforesaid with the Appurtenances Levant and Couchant every Year at all Times of the Year, as to their Tenements aforefaid belonging and appertaining: By Reason whereof the faid John before the faid Time when, &c. to wit, on the oth Day of September in the 33d Year of the Reign

Reign of the faid Lord the now King, the Cattle aforefaid in the Declaration aforefaid above specified, being then the proper Cattle of him the faid John, upon the faid 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, then Levant and Couchant, into the faid Common called Hannam's Common. being the Place in which, &c. put, as he well might, to use his Common aforesaid; and the faid Francis the faid Cattle, to wit, the faid 30 Sheep so in the faid Place in which, &c. put, feeding on the Grass there growing, and using the Common of Pasture of him the said John there, afterwards at the faid Time when, &c. to wit, on the 10th Day of September in the 33d Year abovefaid, at Bitton aforesaid in the said Place in which, &c. commonly called Hannam's Common, took and them unjustly detained, against Surety and Pledges, in Manner and Form as the faid John above against him complains: And this the same John is ready to verify: Wherefore he prays Judgment, and his Damages by Reason of the Taking and unjust Detention of the Cattle aforefaid, to be adjudged to him, &c.

And the said Francis Creswicke as before Repl. That a says, that the said 50 Acres of Pasture, is his Free-called Hannam's Common, otherwise Han-hold.

nam's Heath, are and at the said Time when, &c. were the Soil and Freehold of him the said Francis; and because the X 4 Cattle

Traverse of the Prescription.

Cattle aforesaid at the said Time when, &c. were in the faid Place in which, &c. eating up the Grass then there growing, and doing Damage there, the faid Francis the fame Cattle took, as he hath above alledged; without that, that the faid Theodore, and all those whose Estate the same Theodore then had of and in the faid Mesfuage and 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, have had, and from Time out of Mind have been accustomed to have, for themselves, their Farmers and Tenants, of the faid Meffuage and the faid 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, Common of Pasture in the said Place in which, &c. for all their commonable Cattle in and upon their Tenements aforesaid with the Appurtenances, Levant and Couchant every Year at all Times of the Year, as to their Tenements aforefaid belonging and appertaining, as the faid John in bar to the Avowry aforesaid hath above alledged: And this he is ready to verify: Wherefore he prays Judgment, and a Return of the Cattle aforesaid, together with his Damages, &c. to be adjudged to him, &c.

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Issue on the Traverse.

And the said John Liddiard as before says, that the said Theodore Newton, and all those whose Estate the same Theodore then had in the said Messuage and 47 Acres and a half of Land Arable, Meadow and Pasture,

Pasture, with the Appurtenances, have had, and from Time out of Mind have been accustomed to have, for themselves, their Farmers and Tenants, of the faid Meffuage and the faid 47 Acres and a half of Land Arable, Meadow and Pasture, with the Appurtenances, Common of Paflure in the said Place in which, &c. for all their commonable Cattle in and upon their Tenements aforesaid with the Appurtenances, Levant and Couchant every Year at all Times of the Year, as to their Tenements aforesaid belonging and appertaining, in Manner and Form as he the faid John Liddiard hath above alledged: And this he prays may be inquired of by the Country: And the faid Francis likewife: Therefore the Sheriff is commanded, that he cause to come before the Lord the King in the Octave of St. Hillary wherefoever, &c. 12, &c. by whom, &c. and who neither, &c. to recognize, &c. because as well, &c. The same Day is given to the Parties aforesaid, &c.

A ND the said A. pleads, That the said A Plea in Bar C. by Reason of any Thing above to an Avowry, alledged, ought not to avow the Taking that the Plaintiff tendered to the Cattle and Chattels aforesaid in the to the Desensaid Place wherein, &c. to be just, (or dant sufficient ought not to justify) because he saith, That Amends for after the said C. had taken the Cattle and the Damage-Chattels in the Place aforesaid, (to wit, [on Feasant.] such a Day and Year] at W. aforesaid, he the

the faid A. tendered to the faid C. 6s. 8d. which were fufficient Amends for the Damages done to him in the faid Place wherein, &c. which 6s. 8 d. the faid C. then and there totally refused to accept, and unjustly detained the Cattle and Chattels aforesaid, against Sureties and Pledges, &c. until, &c. as he the faid A. doth above complain against him; and this he is ready to verify; wherefore, in as much as the faid C. doth above acknowledge the Taking of the faid Cattle and Chattels in the faid Place wherein, &c. he the faid A. prays Judgment and his Damages, occafioned by the Taking and unjustly Detaining of the Cattle and Chattels aforefaid, to be adjudged to him, &c.

Defendant protesting, that the 6 s. 8 d. tendred ficient Amends, for Plea denies the Tender.

And the faid C. protesting, that the 6 s. 8 d. were not fufficient Amends for the Damages aforefaid done to the faid C. was not a fuf. in the faid Place where, &c. for Plea faith, That the faid A. did not tender to the faid C. the faid 6 s. 8 d. for the Damage done in the said Place where, &c. as the said A. hath above alledged; and this he is ready to verify; wherefore he prays Judgment, and a Return of the Cattle and Chattels aforesaid, to be adjudged to him, &c.

Plaintiff re-And the faid A. as before faith, That joins, that he he did tender to the faid C. the faid 6 s. 8 d. 6 s. 8 d. and for the faid Damages done him in the faid Place where, &c. as he hath above al-Pl. Gen. 596, ledged; and this he prays may be inquired 597, 598. of by the Country.

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ND the faid H. by J. T. his At- An Avowry, torney comes and defends the Force where the Deand Injury when, &c. and pleads, That in verseth the the faid County of D. there is a Place Place, and called M. D. and another Place called M. faith, that in E. and another Place called M. J. in E. there are feaforesaid; without that, that in the said known by the Vill of K. there is, or at the faid Time fame Name, when, &c. was any Place called or known but that they by the Name of M. only, and that he, at are differently the faid Time when the faid Cattle is fup- to be described, they haposed to have been taken, took the said ving different fix Oxen and eight Cows above specified Additions. in the said Declaration, and also an Horse of the faid (Plaintiff) in the faid Place called M. D. without that, that he took the faid fix Oxen and eight Cows at K. aforefaid, in the faid Place called M. only; as the faid (Plaintiff) doth above suppose by his faid Declaration, of all and fingular which Cattle aforefaid, one Sir P. E. Knt. then Sheriff of the faid County of D. granted a Replevin to the faid (Plaintiff) upon his Plaint thereon; and this he is teady to verify; wherefore he prays Judgment of the Declaration aforefaid, and to have a Return of all and fingular the Cattle aforefaid; and the faid (Defendant) as Bailiff to 7. B. well acknowledges the Taking of the faid fix Oxen, eight Cows, and one Horse, in the said Place called M. D. and justly, &c. because he faith, [ so go on with

with the Avowry, concluding with a Prayer of a Return], &c.

This Precedent is agreeable to the Case reported in Salk. 93, 94. where the Defendant pleaded, That the Cattle were taken in another Place; without that, &c. and it was held by the Court that this was not enough, but the Defendant must go surther, and make an Avowry for a Returno Habendo, yet such Avowry is only a Suggestion to bring him within the Statute of H. 8. for Damages; before that Statute no Damages were given, and without such a Suggestion he is not within that Statute, and it being only for this particular Purpose, is not traversable.

7 & 21 H. 8.

Plea.

A ND the faid Richard Poole pleads, that the faid Thomas Longevill ought not to avow the Taking of the Cattle aforesaid in the said Place in which, &c. to be just, for the Reason above alledged, nor ought they the said Anthony, William and Thomas Leadale, as Bailiss to the said Thomas Longuevill, to acknowledge the said Taking of the Cattle aforesaid in the said Place in which, &c. to be just, for the

That Plaintiff same Reason, because he saith, That he the at the Time said Richard Poole, at the said Time when,

when, &c. and

long before, was possessed of a Close adjoining to the Place in which, &c. and that T. L. the principal Defendant, and all those, &c. Time out of Mind were used to repair the Fences of the locus in quo, &c. which divided the same from the Plaintiff's Close.

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&c. was, and long before had been possessed of and in a Close of Pasture in Burne aforefaid, near adjoining to the faid Place called Parks, in which, &c. and further, the faid Richard Poole faith, That the faid Thomas Longuevill, and all those whose Estate he the said Thomas Longuevill now hath, and at the faid Time when, &c. had, of and in the Close aforesaid called Parks, in which, &c. for fo long a Time as there is no Remembrance of any Man to the contrary, have made and repaired, and have been used and accustomed to make and repair the Hedges and Fences between, the faid Close called Parks, in which, &c. and the faid Close of Pasture of the faid Richard; and the faid Richard further That those faith, That before and at the Time when, Fences before &c. the Hedges and Fences between the when, &c. faid Close in which, &c. and the faid were out of Close of Pasture of the said Richard Poole Repair. were broken, laid open, and in great Decay for want of repairing them, by which Means the Cattle of the faid Richard being thentofore put into his faid Closes of Pafture, afterwards, and before the faid Time when, &c. that is to fay, upon the 27th By reason Day of February in the 18th Year afore-whereof faid, escaped out of the Close of the said Plaintiff's Cat-Richard, and by the Hedges and Fences the escaped into the locus aforesaid being broken, entred into the said in quo. Close in which, &c. and there remained until they the faid T. L. A.W. and T. afterwards and before that the faid Richard had

Plaintiff had or could have any Notice thereof, Defendants took the Cattle.

and before the had or could have any Notice of the faid Cattle's being in the faid Place in which. &c. (to wit) at the faid Time when, &c. took the faid Cattle in the faid Place in which, &c. and unjustly detained them against Sureties and Pledges, in the Manner and Form as the faid Richard doth above complain thereof against them; and this he is ready to verify; wherefore, and in as much as the said T. A. W. and 7. do above acknowledge the Taking and Detaining of the Cattle aforesaid, he the

Plaintiff prays faid R. P. prays Judgment, occasioned by Judgment, and the Taking and unjustly Detaining of the his Damages. Cattle aforesaid, to be adjudged to him,

Edc.

2 Saund. 289. 290. 2 Keb. 660, 680, 709. 2 Danv. 642. pl. 57. 2 Vent. 50. 3 Lev. 260. Lutw. 1165, 1577, 1578. 227. 2 Inft. 192. Rol. Abr. 671. Plowd. 38. 2 Edw. 4. 6. 2 Leon. 7. 3 Cro. 549, 596, 628. Dyer 322, 372.

To this Plea in Bar of the Avowry the Defendant demurred, and the Plaintiff joined in Demurrer, and Judgment was given in the Common Pleas for the Defendant, that the Plaintiff's Plea in Bar was not good; upon which a Writ of Error was brought, and the Counfel for the Plaintiff in Error argued, that the Judg-1 Saund. 226, ment was erroneous, and that the Cattle could not be distrained, because they Co. Lit. 161, escaped for the Default of Fences, which upon the Face of the Record ought to have been repaired by the Defendant Longuevill: But notwithstanding this the Judgment was affirmed, and the Court relied much upon the Case in 10 H. 7. 21. B. where it is faid, That if the Cattle escape into any Land, and the Lord distrains them,

them, such Distress is good, and that it is Fitz. Avow. not material whether they were Levant and 219: Couchant or not; but Saunders in the Re- 15 H. 7. 17. port of this Case takes Notice, that this Bro. Distress Case, in his Opinion, was hard to be main- (43, 57.) tained; for, fays he, there is a vast Dif- Trespass 181. ference between a Lord's distraining within 43 Ed. 3. 32. his Seigniory and a Leffor's diffraining for 398. Rent reserved upon his own Lease; for the 1 Sid. 70. Lord hath nothing to do with the Land or 2 Mod. 316, the Fences, and fo it is not material to him 317. whether the Fences are in Repair or not; 2 Lev. 22. but it is otherwise of a Lessor, for he him- 5 Mod. 147. felf ought to repair the Fences, or to take 148. care that his Tenant repairs them; for otherwise he would take an Advantage of his own Wrong, which would be inconvenient; and this Diffinction (fays he) feems to be warranted by the Books of Mich. 14 & 15 El. Dyer 317, 318. 22 Ed. 4. 49. b. 7 H. 7. 1. 15 H. 7. 17. But if the Cattle escape into the Land without any Default of the Fences, or that the Tenant of the Land is not bound to repair those Fences, for Default whereof the Cattle escape and are distrained, it is not material to the Lord or Lessor, whether they are Levant and Couchant or not. Note: the Case of Reynolds and Oakley, reported in 1 Brownl. 170. and in Hob. 265. feems to favour this Opinion of Saunders; there the Defendant avowed for Rent reserved upon a Lease for Life, and the Plaintiff in his Plea in Bar to the Avowry shews, that

the Place in which, &c. did adjoin to the Plaintiff's Close, and that the Cattle, against the Plaintiff's Will, did escape into the other Close, and that he did presently follow the Cattle, and before he could drive them out of the Close the Defendant distrained them. The Court held, That in as much as the Beafts were always in the Plaintiff's Possession, and in his View, the Defendant could not distrain those Cattle as the Cattle of a Stranger; but if he had permitted the Beafts to have remained there by any Space of Time, tho' they had not been Levant and Couchant, the Leffor might have distrained them as the Beasts of a Stranger. In the Report of this Case in Hob. the Opinion of the Court does not appear, for it is there faid, the Case had been somewhat better if the Tenant ought to maintain the Fences.

# Eldridge and Burfeild.

Nonfuit in Replevin for

Suffex, to wit. THomas Eldridge was summoned to answer to Ronot declaring. bert Burfeild in a Plea, why he took feven Cows of him the faid Robert and them unjustly detained, against Surety and Pledges, &c. And whereon the same Thomas in his proper Person hath offered himself the fourth Day against the said Robert in the Plea aforesaid; and the same Robert, altho' folemnly called, doth not come, but hath made Default: Therefore it is considered, that

that the said Thomas Eldridge do go thereof without Day, &c. and that the faid Robert and his Pledges to profecute, to wit, John Doe and Richard Roe be in Mercy, &c. 2. The Names of the Pledges, &c. and that the said Thomas have a Return of the Cows aforesaid, &c. Afterwards, to wit, on Day next after in this same Term before the Lady the Queen at Westminster comes here into Court the faid Robert Burfeild by A. B. his Attorney, and by the Statute, &c. prays 13 E. i. c. 2. the Writ of the Lady the Queen of fecond Deliverance of the Cattle aforesaid; and to him'it is granted, returnable here from the wheresoever, &c. Day of

INNE, &c. To the Sheriff of Middle- Inquiry of fex, Greeting: Whereas John S. late Damages in of the Parish of St. Clement Danes in your Replevin County, Esq; was summoned to be in our ment was Court before us to answer to William P. Esq; given for the in a Plea, why on the 14th Day of October Defendant on in the first Year of our Reign, at the Parish of St. Clement Danes in your County, in a certain Place there called a Chamber in Devereux Court, he took the Goods and Chattels of him the faid William, to wit, one Bed, one Bedstead, one Bolster, one Pillow, four Curtains Vallance, two Blankets, one Quilt, one Chest of Drawers, 20 Books, one Looking-glass, one large Brush, one large Trunk, and four Chairs, and unjustly detained them, against Surety and Pledges

Pledges, until, &c. And the faid John S. came and in our fame Court before us alledged and faid, that the faid William ought not to have or maintain his Action aforefaid thereof against him, because he said, that as to the faid one Bed, one Bedftead, one Bolfter, one Pillow, four Curtains Vallance, two Blankets, one Quilt, one Looking-glass and 10 Books, Parcel of the Goods and Chattels aforesaid in the Declaration aforefaid mentioned, the Property of those Goods and Chattels at the said Time of the Taking of the fame was in him the faid John; without that, that the Property of those Goods and Chattels at the said Time of the Taking of the same was in the faid William, as by the Declaration aforesaid was above supposed: And this he was ready to verify: And as to the faid one Chest of Drawers, one large Brush, one large Trunk, 10 other Books and four Chairs, the Residue of those Goods and Chattels last mentioned, the Property of the fame Goods and Chattels was in one Richard F. without that, that the Property of the Residue of those Goods and Chattels was in the faid William, as by the Declaration aforesaid was above supposed: And this he was ready to verify and prove, &c. Wherefore he prayed Judgment if the faid William ought to have or maintain his Action aforesaid thereof against him, &s. and he prayed also a Return of all and fingular

resphei-

fingular the Goods and Chattels aforefaid, together with his Damages, Costs and Charges by him about his Suit in that Behalf expended, to be adjudged to him, &c. And the faid William faid, that the Demurrer. Plea aforefaid by the faid John above pleaded, and the Matter in the fame contained, were infufficient in Law to preclude him the faid William from having his Action aforefaid against the faid John, and that he to that Plea in Manner and Form aforefaid pleaded had no Necessity, nor was by the Law of the Land obliged in any Manner to answer: And this he was ready to verify: Wherefore for want of a fufficient Answer in this Behalf, he the fame William prayed Judgment and his Damages, by Reason of the Caption and unjust Detention of the Goods and Chattels aforefaid, to be adjudged to him, &c. And the faid John faid, that the Plea Joinder. aforefaid by him the faid John in Manner and Form aforesaid above pleaded, and the Matter in the fame contained, were good and fufficient in Law to preclude the faid William from having his Action aforefaid against him the faid John; which faid Plea, and the Matter in the fame contained, he the same John was ready to verify and prove, as the Court, &c. And because the said William did not answer to that Plea, nor hitherto in any wife deny it, he the same John (as before) prayed Judgment, and a Return of all and fingular the

the Defendant.

the Goods and Chattels aforesaid, together with his Damages, &c. to be adjudged to Judgment for him, &c. And it was thereupon in such Manner proceeded in our fame Court before us, that it was considered, that the Plea aforesaid by him the said John above pleaded, and the Matter in the same contained, were good and sufficient in Law to preclude the faid William from having his Action aforefaid against him the faid John: It was also considered, that the said William P. should take nothing by his Writ aforefaid, but for his false Claim should be in Mercy, &c. and that the faid John ought to recover his Damages against the faid William by reason of the Caption and unjust Detention of the Goods and Chattels aforesaid: Therefore we command you, that by the Oath of 12 good and lawful Men of your Bailiwick you diligently inquire what Damages the same John hath fustained, as well by Reason of the Caption and unjust Detention of the Goods and Chattels aforefaid, as for his Costs and Charges by him about his Suit in this Behalf expended; and the Inquisition which you shall thereof take fend to us on wherefoever we shall then be in England, under your Seal and the Seals of those by whose Oath you shall take that Inquisition, together with our Writ to you therefore directed. Witness J. Holt, Knt. at Westminster 12th Day of February in the second Year of our Reign.

GEORGE.

GEORGE, &c. To the Sheriff of Suf- An Inquiry of Sex, Greeting: Whereas William A. the Arrear of Rent and Vawas summoned to be in the Court of the lue of the Lady Anne, late Queen of Great Britain, Cattle di-&c. before the late Queen herself, to an-strained on a fwer to Matthew G. in a Plea, why the Nonsuit in faid William on the 9th Day of April in the Replevin. 12th Year of the Reign of the faid Lady the Queen, at Chalvington in the County aforesaid, in a certain Place there called the Croft, took the Cattle, to wit, 8 ewes and 6 Lambs of him the faid Matthew, and them unjustly detained, against Surety and Pledges, &c. And the same William in the same Court before the said Lady the late Queen appearing, for a certain Cause by him alledged faid, that he took the Cattle aforesaid at Ripe, otherwise Cocklington in the County aforefaid; without that, that he took the Cattle aforesaid at Chalvington in the County aforesaid, as the faid Matthew by his Declaration aforefaid had above alledged: And this he was ready to verify: Wherefore he prayed Judgment of the Writ aforesaid, and that the said Writ and Declaration, &c. and to 3 Leon. 213. have a Return of the Cattle aforesaid; the fame William, as Bailiff of Robert R. well acknowledged the Taking of the Cattle aforesaid in the said Place to be just, &c. because he said, that the same Place, called the Cony Earths, contained in itself 5 Acres of Land with the Appurtenances in the faid

faid Parish of Ripe, otherwise Cocklington in the County aforefaid, of which faid 5 Acres of Land with the Appurtenances the fame Robert R. before the faid Time when, &c. was seised in his Demesne as of Fee: and being fo thereof feifed, before the faid Time when, &c, to wit, on the 18th Day of March in the 11th Year of the Reign of the faid Lady the late Queen, at the Parish of Semisten in the County aforesaid, the said Robert R. demised to one Matthew G. the Younger the faid 5 Acres of Land with the Appurtenances, by the Name of all those two Pieces or Parcels of Pasture, called the Cony Earths, with the Appurtenances lying and being in Ripe, otherwise Cocklington aforesaid; To have and to hold the faid 5 Acres of Land with the Appurtenaces whereof, &c. to the same Matthew G. from the Feaft of the Annunciation of the Bleffed Virgin Mary then next enfuing unto the End and Term of one whole Year, and so from Year to Year as long as both Parties should please; Yielding and paying therefore the yearly Rent or Sum of 50 s. of lawful Money of Great Britain, at the two most usual Feasts or Terms in the Year, to wit, on the Feast of St. Michael the Archangel and the Annunciation of the Bleffed Virgin Mary, by even and equal Portions to be paid: By Virtue of which Demise the same Matthew G. the Younger, afterwards and before the faid Time when, &c. to wit, on the 26th Day of

of March in the Year last abovesaid, into the faid 5 Acres of Land with the Appurtenances whereof, &c. entred, and was thereof possessed; and he the said Matthew G. the Younger being so thereof possessed, and the faid Robert of the Reversion of the faid 5 Acres of Land with the Appurtenances being feifed in his Demefne as of Fee; and because 50 s. of the Rent aforefaid, for one Year ended on the Feast of the Annunciation of the Bleffed Virgin Mary in the 12th Year of the Reign of the faid late Queen, to the same Robert after that Feast and at the said Time when, &c. were in Arrear and unpaid, the same William, as Bailiff of the faid Robert, well acknowledged the Taking of the Cattle aforesaid in the said Place in which, &c. as in Parcel of the Tenements aforefaid with the Appurtenances whereof, &c. to the same Matthew G. in Form aforesaid demised, and justly, &c. for the faid 50 s. Rent to the faid Robert in Form aforefaid being in Arrear, &c. And this he was ready to verify: Wherefore he prayed Judgment, and a Return of the Cattle aforefaid, together with his Damages, Cofts and Charges in this Behalf expended, according to the Form of the Statute in fuch Case made and provided, to be adjudged to him, &c. And afterwards the faid Lady the Queen Demise of the departed this Life: And upon this the faid Queen. Matthew prayed Leave of our Court before us until on the Morrow of the Holy

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Trinity.

# APPENDIX.

Nonfuit.

Inquiry.

Trinity, wherefoever, &c. to plead in Bar to the Cognisance aforesaid; and he had, &c. The same Day was given to the said William, &c. On which Day came the faid William into our same Court before us at Westminster; and the faid Matthew, altho' folemnly called, did not come, nor farther profecute his Writ aforesaid: Therefore it is considered, that the said Matthew take nothing by his Writ aforesaid, but be in Mercy for his false Claim thereof, and that the said William do go thereof without Day, &c. Therefore we command you, that according to the Form of the Statute 17 C. 2. C. 7. in fuch Case lately made and provided, by the Oath of 12 good and lawful Men of your County you diligently inquire how much of the yearly Rent aforesaid at the faid Time of the taking and distraining of the Goods and Chattels aforefaid was in Arrear and unpaid, and how much the Goods and Chattels aforefaid fo as aforefaid taken and diffrained were worth, according to the true Value of the same; and the Inquisition which, &c. fend to us from the Day of St. Michael in three Weeks under your Seal and the Seals of those by whose Oath you shall take that Inquisition, together with this Writ. Witness T. Parker, Knt.

> The Execution of this Writ appears in a certain Schedule to this Inquisition annexed.

> > Suffex,

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Suffex, to wit. A N Inquisition indented The Return. taken at Eastgrinstead in the County aforefaid on the fifth Day of August, &c. In Witness whereof as well I the Sheriff as the Jurors aforesaid have to this Inquisition set our Seals the Day, Year and Place abovefaid.

James Smith, Bart. Sheriff.

The Rent in Arrear 8 %. The Value of the Goods 8 l. For Costs, according to the Form of the Statute, 9 l. 8 December 1715.

MAMES, &c. To the Sheriff of Glou- An Inquiry of J cester, Greeting: Whereas John W. Damages in Gent. lately in our Court before us at Replevin after Westminster, by our Writ impleaded Francis Demurrer. C. Efq; Henry C. the Elder, George T. William B. and Henry C. the Younger, in a Plea, why they took the Cattle of him the faid John, and them unjustly detained, against Surety and Pledges, &c. And thereupon the same John by Thomas E. his Attorney complained, that the faid Francis, Henry C. the Elder, George, William, and Henry C. the Younger, on the first Day of September in the 36th Year of the Reign of the Lord Charles the Second, late King of England, &c. at the Parish of St. Philip and James in your County aforesaid,

in a certain Place there called Conham, took

the Cattle, to wit, fifty Sheep of him the faid John, and them unjustly detained, against Surety and Pledges, until, &c. whereby he then faid that he was prejudiced, and had Damage to the Value of 201. And therefore he then produced the Suit, &c. And thereupon the faid Francis, Henry, George, William and Henry, by C.H. their Attorney came and defended the Avowry and Force and Injury when, &c. And the faid Francis in his own Right well avowed, and as Bailiff of Thomas S. and Stephen C. Gent. well acknowledged, and the faid Henry, George, William and Henry, as Bailiffs of the faid Francis, Thomas and Stephen, well acknowledged the Taking of the Cattle aforesaid, in the said Place in which, &c. and justly, &c. because they said that long before the faid Time when, &. the Lord Charles the Second, late King of England, &c. was seised of and in the Forest or Chase called Kings-wood, with the Appurtenances in your County aforesaid, in his Demesne as of Fee in the Right of his Crown of England; and that the faid Place in which, &c. is and at the faid Time when, &c. and also for Time immemorial was within the Forest aforesaid, and Parcel of the same Forest, and that the same late King being so seised before the said Time when, &c. by Indenture made at Westminster in the County of Middlesex, on the 20th Day of January in the 21st Year of the Reign of the same late King, between

the

Cognisance.

the fame late King of the one Part, and one Baynbam T. Knt. and Bart. of the other Part, which faid Indenture fealed under the Great Seal of England, the same Francis, Henry, George, William and Henry then in Court produced, the Date whereof is the Day and Year last abovefaid, the same late King Charles the Second, for the Confiderations in the fame Indenture mentioned, with the Advice of two of the Commissioners of the Treasury of the fame late King, granted, demised and to farm let to the faid Baynham the Forest or Chase aforesaid, with the Appurtenances, by the Name of all that Forest or Chase called King wood, lying and being in or near the Parish of St. Philip and James in the City of Briftol in the Parish of Bitten Mangetfield, otherwise Mangerfield Stapleton, otherwife Stableton, Hambrooke and Westanbam in your County, containing by Estimation 3432 Acres of waste Land, more or lefs, and extending on fundry other Lands, as well Waste as inclosed, in or near the Parishes aforesaid, or some of them, together with all Bucks, Does and other Beafts then being within the Limits of the Forest or Chase aforesaid, and all Liberties, Franchifes, Privileges, Rights and Appurtenances to the fame Forest or Chase belonging, incident or appendant, or within the Forest or Chase then before had, used or enjoyed in the Times of the Lady Elizabeth, late Queen of England, or of the Lord James, late King of England, and the

the Lord Charles the First, late King of England, or any of them, by Reason or Pretence of the faid Forest or Chase, or the Liberties and Franchises of the same. to have and to hold the faid Forest, Chase, Franchifes, Liberties, Privileges, and all and fingular other the Premisses in the fame Indenture mentioned and intended to be thereby granted, with their and every of their Appurtenances to the faid B.T. his Executors, Administrators and Affigns, from the Feaft of St. Michael the Archangel then last past, for and during the Term of 60 Years from thence next enfuing, fully to be compleat and ended: And the faid late King Charles the Second willed, and by the same Indenture for himself, his Heirs and Successors, gave and granted to the faid Baynbam, his Executors, Administrators and Assigns, full Power and Authority to replenish the Forest or Chase aforesaid with Deer, and by all lawful Ways and Means to erect Lodges for the Keepers, and to hinder and suppress Purprestures, Assarts and Nusances there, of what Nature or Kind foever, and also to preserve the Covert and Vert for the Safety and Preservation of the Beasts aforefaid, as by the Indenture aforefaid, among other Things is more fully manifest; by Virtue of which faid Demise the faid Baynbam into the Forest or Chase aforesaid, with the Appurtenances entered, and was thereof possessed, and being so thereof posfeffe befe on

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fessed, the same Baynham afterwards, and before the said Time when, &c. to wit, on the first Day of March in the 32d Year of the Reign of the faid Lord King Charles the Second, at the Parish of St. Philip and James aforesaid, assigned to one Mary B. the Premisses aforesaid, with the Appurte. nances, and all his Right, Title and Interest of and in the same, to have and to hold to the same Mary, her Executors and Affigns, during all the Refidue of the faid Term of 60 Years then to come and unexpired, by Virtue of which faid Affignment the same Mary into the Premisses aforefaid entred and was thereof possessed; and being so thereof possessed, the faid Mary afterwards and before the faid Time when, &c. to wit, on the third Day of January in the 33d Year of the Reign of the faid Lord King Charles the Second, at the Parish of St. Philip and James aforesaid, affigned to the said Francis, Thomas and Stephen the Premisses aforesaid, with the Appurtenances, and all her Right, Title and Interest of and in the same, to have and to hold to the same Francis, Thomas and Stephen during all the Residue of the faid Term of 60 Years then to come and unexpired, by Virtue of which faid Affignment the same Francis, Thomas and Stephen into the Premisses aforesaid, with the Appurtenances entred, and were and yet are thereof possessed; and because the Cattle aforesaid at the said Time when, &c. were

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in the faid Place in which, &c. eating up the Grass there growing, and doing Damage there, the faid Francis in his own Right well avowed, and as Bailiff of the faid Thomas and Stephen acknowledged, and the faid Henry, George, William and Henry, as Bailiffs of the faid Francis, Thomas and Stephen, well acknowledged the Taking of the Cattle aforesaid in the said Place in which, &c. and justly, &c. fo doing Damage there: And this they were ready to verify: Wherefore they prayed Judgment, and a Return of the Cattle aforefaid, together with their Damages, Costs and Charges in that Behalf expended, according to the Form of the Statute in such Case made and provided, to be adjudged to them, &c. And the faid John W. thereto faid, that the faid Francis, Henry, George, William and Henry, for the Reason, before alledged, ought not as Bailiffs of the faid Thomas S. and Stephen C. to acknowledge, nor the faid Francis in his own Right to avow the Taking of the Cattle aforefaid in the faid Place in which, &c., just; because by protesting that the faid Lord King Charles the Second never was feifed of the Soil or Land of the Forest or Chase of King fwood aforesaid, for Plea the same John W. faid, that long before the faid Time of the Taking of the Cattle aforesaid made, and also before the said Time when it is supposed that the said late King Charles the Second was seised of the Forest or Chase aforesaid,

Plea.

aforefaid, to wit, on the third Day of April in the 23d Year of the Reign of the late King Charles the First, John W. the Elder, Father of him the faid John W. was feised of the Manor of St. Lawrence within the Parish of St. Philip and James, with the Appurtenances in your County aforefaid, whereof the faid Place in which, &c. is and at the faid Time when, &c. and alfo for Time immemorial was Parcel, in his Demelne as of Fee; and being fo thereof feifed, the same John W. the Elder afterwards and before the faid Time when. &c. at Conham aforesaid died of such his Estate thereof seised, after whose Death the faid Manor with the Appurtenances, whereof the faid Place in which, &c. is Parcel. descended to the said John as Son and Heir of him the faid John, by Reason whereof the faid John the Son afterwards and before the said Time when, &c. into the faid Manor with the Appurtenances entred, and at the Time of the Taking of the Cattle aforesaid was and yet is seised thereof in his Demefne as of Fee, and being fo thereof feised, the same John before the faid Time when, &c. put his Cattle aforefaid into the faid Place in which, &c. to feed on the Grass there then growing, until the said Francis, Henry, George, William and Henry on the Day and Year in the Declaration aforesaid specified at Conham aforesaid, took the Cattle aforesaid of him the said John, and unjustly detained them against

Demurrer.

The Causes. 27 El. c. 5. 4 Ann. c. 16.

Joinder in Demurrer.

against Surety and Pledges, until, &c. as he above against them complained: And this he was ready to verify: Wherefore he prayed Judgment and his Damages, by Reason of the Caption and unjust Detention of those Cattle, to be adjudged to him, &c. And the faid Francis, Henry, George, William and Henry thereupon said, that the faid Plea of the faid John above in Bar of the Avowry and Cognisance aforesaid pleaded, was infufficient in Law to maintain him the faid John to have his Action aforefaid against them the said Francis, Henry, George, William and Henry, and that they to that Plea in Manner and Form aforesaid pleaded had no Necessity, nor were by the Law of the Land obliged in any Manner to answer: And this they were ready to verify: Wherefore for want of a fufficient Plea in this Behalf they prayed Judgment, and a Return of the Cattle aforefaid, together with their Damages in this Behalf fustained, to be adjudged to them, &c. And for Cause of Demurrer in Law in this Behalf, the same Francis, Henry, George, William and Henry did fet down, and to the Court here express the Causes following, to wit, that the faid John in his Plea aforesaid did not traverse the Matter in the Avowry and Cognifance aforefaid, when he ought to traverse that Matter, as they faid; and because the Matter of that Plea was not issuable nor triable, and because that Plea was infufficient and wanted Form, and

and thereupon the faid John W. faid that the Plea aforesaid by him the said John above in Bar to the Avowry and Cognifance aforesaid pleaded, and the Matter in the fame contained, were good and fufficient in Law to preclude the said Francis, Henry, George, William and Henry from having their Avowry and Cognisance aforefaid; which faid Plea, and the Matter in the same contained, the same John was ready to verify and prove, as the Court, &c. And because the said Francis, Henry, George, William and Henry to that Plea did not answer, nor hitherto in any wife deny it, the same John as before prayed Judgment and his Damages aforefaid, by reason of the Caption and unjust Detention of the Cattle aforefaid, to be adjudged to him, &c. And because the Court of the said Lord the King here were not advised to give their Judgment of and upon the Premisses, Day therefore was given to the Parties aforesaid before the said Lord the King from the Day of Easter in 15 Days, wherefoever, &c. to hear their Judgment of and upon the Premisses, because the Court of the faid Lord the King thereof, &c. On which Day before the Lord the King at Westminster came the Parties aforefaid, by their Attornies aforesaid; where- Judgment for upon all and fingular the Premisses being the Plaintiff. feen, and by the Court of the faid Lord. the King fully understood, and mature Deliberation being thereon had, it was confidered

Inquiry.

fidered that the Plea aforesaid by him the faid John above in Bar to the Avowry and Cognisance aforesaid pleaded, was good and fufficient in Law to maintain him the faid John to have his Action aforesaid against them the faid Francis, Henry, George, William and Henry: Wherefore it was also confidered, that the faid John ought to recover his Damages against them the said Francis, Henry, George, William and Henry, by Reason of the Caption and unjust Detention of the Cattle aforesaid; but because it is not known what Damages the faid John hath sustained by the Reason aforefaid; therefore we command you, that by the Oath of twelve good and lawful Men of your Bailiwick you diligently inquire what Damages the faid John hath fuftained, as well by Reason of the Premisses as for his Costs and Damages by him about his Suit in this Behalf expended; and the Inquisition which you shall thereupon take, fend to us wherefoever, &c. under your Seal and the Seals of those by whose Oath you shall take that Inquisition, together with this Writ. Witness Edmund Herbert; Knt. at Westminster, the 17th Day of May in the fecond Year of our Reign.

The Manner of entring an Inquisition in Replevin, according to the Statute of 17 Car. 2. upon a Judgment for the Avowant upon a Demurrer, where a Writ of Inquiry was awarded to inquire of the Value of the Distress, and a Judgment thereon.

After awarding the Inquiry, and the Words, The same Day is given to the (Plaintiff) to be there, &c. you say thus:

A T which Day the faid T. R. (i. e. the Plaintiff) comes before our Sovereign Lord the King at Westminster, by his Attorney aforesaid, and the Sheriff (to wit) 7. A. Esq; returns an Inquisition taken before him at the Castle of York in the County aforesaid, on the 30th Day of March in the eighth Year of the Reign of his present Majesty, whereby it is found that the faid fix Hogsheads of Allum, at the Time of the Taking thereof \* were worth \* Note; when 100 l. according to the true Value thereof; the Goods are therefore it is adjudged, That the faid inanimate, T. R. do recover against the said J. M. the they say, were faid 100 l. for the Value of the faid fix worth so Hogsheads of Allum, + Part of the faid mate, were of Rent, being in Arrear as aforesaid, found such a Price.

+ Thefe

Words are where the Diffress doth not amount to the Value of the Rent.

by the faid Inquisition in the Manner aforefaid, and his Damages sustained by Reason
of the Premisses here adjudged by the said
Court of our said Sovereign Lord the
King, according to the Form of the Statute in such Case made and provided, to
the said T. R. to 80 l. with his Consent,
for his Expences and Costs laid out by
him about his Suit in this Cause, which
said Value, Expences and Costs, do in the
Saund 195 Whole amount to 180 l. and be the said
J. M. amerced, &c.

An Inquisition and Judgment upon the same Statute, upon a Judgment on a Demurrer for the Avowant, and a Writ to inquire of the Monies in Arrear, and of the Value of the Distress, and Judgment thereon.

After the Judgment upon the Demurrer that the Plea in Bar to the Avowry is infufficient, concluding, that the Plaintiff take nothing by his Writ, but he amerced for his false Complaint, and that the Defendant is dismissed the Court, you go on thus:

A ND thereupon they the faid T. A. W. and T. according to the Form of the Statute in such Case made and provided, pray his Majesty's Writ to be directed to the Sheriff of the County aforesaid, to inquire

quire what Monies were in Arrear for the Rent aforesaid, at the Time of the Diftress made as aforesaid, and the Value [or Price] of the Cattle taken; therefore the Sheriff is commanded, that by the Oath of twelve good and lawful Men of his Bailiwick he diligently inquire what Sums of Money were in Arrear for the Rent aforefaid at the Time of the Distress made, and what was the Value of the Cattle distrained according to the true Value thereof; and the Inquisition which,  $\mathcal{C}_c$  the Sheriff should return, or make appear here in three Weeks from the Day of St. Michael, under the Seal, &c. and the Seals, &c. at which Day T. A. W. and T. came here by their faid Attorney, and the Sheriff, (to wit) Sir R. M. Knight and Baronet, now returns an Inquisition taken before him at the Castle of York in the County aforesaid, on the 6th Day of August last past, by the Oath of twelve good and lawful Men, whereby it is found that the faid Sums of Money in Arrear for the Rent aforefaid, to the faid T. L. at the Time of the Distress were 30 l. and that the Cattle distrained, according to the true Value [or Price] thereof, were worth 38 l. Therefore it is adjudged, that the faid T. A. W. and T. do recover against the said R. P. the said 38 l. for the Value of the Cattle aforesaid, being Part of the Rent in Arrear as aforefaid, found by the faid Inquisition in the Manner aforefaid, and his Damages by Z 3

reason of the Premisses, by this Court adjudged to the faid T. A. W. and T. at their Request, by the Discretion of the Justices here, for his Expences and Costs laid out by them in this Suit, according to the Form of the Statute in such Case made and provided, to 10 l. which Value, Ex-1 Saund. 286, pences and Costs, do in the Whole amount

to 48 1. &c. 287.

## Retorno Habendo.

A Retorn' Habend' after the Defendant, upon a Replevin.

GEORGE the Second, &c. To the Sheriff of Middle sex, Greeting: Whereas Judgment for 7. S. late of the Parish of St. Clement's Danes in your County, Esq; was sum-Demurrer in moned to be in our Court before us, to answer to W. P. Esq; of a Plea, (or in an Action) wherefore on the 14th Day of October in the first Year of our Reign, at the Parish of St. Clement's Danes in your County, in a certain Place there, called a Chamber in Devereux Court, he took the Goods and Chattels of the faid W. (to wit) one Bed, one Bedstead, &c. [ so naming the Goods and unjustly detained them against Sureties and Pledges, until, &c. and the faid 7. S. came into our fame Court before us, and alledged and pleaded, that the faid William ought not to have or maintain his faid Action thereof against him, because he faid, That as to the one Bed, one Bedstead, [repeating Part of the Goods] Part of the Goods and Chattels aforefaid in the faid DeclaDeclaration mentioned, that the Property of those Goods and Chattels at the aforefaid Time of taking them were the Property of the faid 7. and this he was ready to verify; and as to one Couch, ten other Books, [ so naming the Goods to which he pleads this Plea Residue of the said Goods and Chattels in the Declaration of the faid W. mentioned, the faid John pleaded, That at the Time of taking those Goods and Chattels the Property of them was in and belonged to one R.F. without that, that the Property of the faid Residue of the Goods and Chattels in the Declaration mentioned, at the Time when, &c. was the Property of the faid William, as by the faid Declaration above was supposed; and this he was ready to verify and prove; wherefore he prayed Judgment, if the aforesaid William ought to have or maintain his faid Action against him for the fame, &c. and he also prayed a Return to be adjudged to him of all the Goods and Chattels aforefaid, together with his Damages, Expences and Costs laid out by him about his Suit in that Behalf; and the faid William replied, That the Plea of the faid John above pleaded, and the Matter therein contained, were not sufficient in Law to preclude the faid William from having his faid Action against the faid John for the same, and that he was not under a Necessity, nor was bound by the Law of the Land to answer in any Manner Z 4 to

to that Plea, in the Manner and Form as the fame was pleaded; which he was ready to verify; wherefore, for want of a sufficient Answer in that Behalf, he the said William prayed Judgment, and his Damages occasioned by the Taking and unjustly Detaining the Goods and Chattels, to be adjudged to him, &c. and the faid John rejoined, That the Plea aforesaid by him pleaded, in the Manner and Form aforefaid, and the Matters therein contained, were good and fufficient in Law to preclude the faid William from having his Action aforefaid thereof against the said John; which Plea, and the Matters therein contained, he the faid John was ready to verify and prove, as the Court should require; and because the said William had not answered to that Plea, nor in any wise denied the same, he the said John, as above, prayed Judgment, and a Return of all and fingular the Goods and Chattels aforesaid, together with his Damages, &c. to be adjudged to him, &c. and fuch Proceedings were thereupon had in our fame Court before us, that it was adjudged, that the faid Plea by him the faid John above pleaded, and the Matters therein contained, were good and fufficient in Law to preclude the aforesaid William from having his faid Action against the faid John; and it was also considered by our same Court before us, that the faid W. should take nothing by his faid Writ, but for his false

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false Claim therein should be in Mercy, (or amerced) &c. and that the aforesaid 7. S. should go thereof without a Day, (or should for ever be dismissed the Court), &c. and that he should have a Return of the Goods and Chattels aforefaid, to be delivered to him for ever irreplegiable: And further, it was confidered in our faid Court before us, That the aforefaid John ought to recover his Damages against the said W. by reason of the Premisses: Therefore we command you, that without Delay you cause the said John to have a Return of the Goods and Chattels irreplegiable, and that you shall not deliver those Things of which you have made Mention, which belong to the Complaint of the faid William, without our Writ, which shall expresy mention the faid Judgment; and in what Manner you shall execute this Writ, do you make appear to us, wherefoever we shall then be in Great Britain, on

We command you likewise, That by the Oath of 12 honest and lawful Men of your Bailiwick, according to the Form of the Statute in that Case made and provided, you diligently inquire what Damages the said John hath sustained, as well by reason of the Premisses, as for his Expences and Costs laid out by him about his Suit in that Behalf, and the Inquisition which you shall take thereon do you return to us at the Day aforesaid, wheresoever we shall then be in Great Britain, under your Seal,

and the Seals of those by whose Oath you shall take such Inquisition, together with this our Writ to you directed for that Pur-Witness Robert Lord Raymond, &c. pose.

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The Return of a Retorn' Writ of Enquiry by the and a Capias awarded.

T which Day comes here the faid De-A fendant by his Attorney aforefaid, Habend' and a and the Sheriff, (that is to fay) W. H. Efq; now returneth here, that in order to have Bailiff of the an Execution of the Writ aforesaid to him Liberty, and directed, he made a Mandate to Sir John a Non omittas Hobbart, Knight and Baronet, Bailiff of the Liberty of our Sovereign Lord the King, of his Duchy of Lancaster in the County aforesaid, who hath full Power of returning all Writs, and of executing the fame within the Liberty aforefaid, to whom the Execution of the Writ aforefaid doth entirely belong to be made; for that no Execution of the Writ aforesaid, within the Liberty aforesaid, in his Bailiwick, could be made by him, which Bailiff made a Return to the faid Sheriff, upon the Mandate aforesaid, that before the coming of the Mandate aforesaid to his Hands, the Cattle, Goods and Chattels aforefaid were eloined by the faid Plaintiff to Places to the faid Bailiff unknown, fo that he could not cause the Cattle, Goods and Chattels aforesaid of the said (Defendant) to be returned, as by the Warrant aforesaid he was commanded; the faid Bailiff also returned, to the faid Sheriff an Inquisition taken before him at F. within the Liberty aforefaid faid in the County aforefaid, on the 1st Day of October last past, by the Oath of twelve, &c. by Virtue of the Warrant aforefaid directed by the Sheriff upon the Writ aforesaid to the said Bailiff, by which it was found, that the faid Defendant fustained Damage by reason of the Premisses, besides his Costs, to for those Costs and Charges to Therefore it is adjudged, That the faid Defendant do recover against the faid Plaintiff his Damages aforefaid to by the Inquisition found in the Manner aforesaid; and also Pounds to the faid Defendant, at his Request, for his Costs and Charges aforefaid, adjudged by the Court by way of Increase, which Damages do in the Whole amount to &c. And hereupon the Sheriff is commanded, that he do not omit, by reason of any Liberty of the Duchy of Lancaster aforefaid; but that of other Cattle, Goods and Chattels of the (Plaintiff) to the Value of the Cattle, Goods and Chattels aforesaid before taken, he take in Withernam, and deliver them to the faid Defendant, to be detained by him until the Cattle, Goods and Chattels aforefaid before taken be delivered by the (faid Plaintiff) and in what Manner, &c. the Sheriff shall make appear, &c.

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A Retorn' labend' aainst the 'laintiff, for an Avowry. Thef. Brev. 220.

GEORGE the Second, &c. Greeting: Whereas A. B. lately in our Court before us at Westminster, was summoned to efault of his answer to C. D. in an Action, wherefore he rlea in Bar to took nine Cows, the Cattle of him the faid C. and unjustly detained them, against Sureties and Pledges, &c. and the faid A. appearing in our fame Court before us, for a certain Reason by him alledged in our fame Court, in his own Right, and the Right of S. his Wife, well avowed the Taking of the faid Cattle in the Place in which, &c. to be just, for 9 l. Rent due and in Arrear from him the faid C. to the faid A. and S. for one half Year, ending at the Feast of the Annunciation of the Blessed Virgin Mary next before, &c. [as in the Avowry] for one Messuage, &c. with the Appurtenances in W. demised by them the faid A. and S. to the faid C. whereupon the faid C. tho' folemnly called, did not appear, nor doth further profecute his faid Writ; wherefore it was confidered in our fame Court before us, That he and his Pledges for profecuting should be amerced, and that the faid A. might depart the Court thereon without a Day, and should have a Return of the said Cattle: Therefore we command you, that without Delay you return the faid Cattle to the faid C. and you shall not deliver them at the Complaint of the faid R. without our Writ, which shall expresly mention the said Judgment;

ment; and in what Manner you execute this Writ, you make appear to us in three Weeks from the Day of St. Michael, wherefoever, &c. and have you there this Writ. Witness, &c.

GEORGE the Second, &c. Greeting: A Retorn' Ha-Whereas T. E. lately in our Court be-bend upon a fore us at Westminster, was summoned to Judgment aanswer to R. B. in an Action wherefore he Plaintiff by took feven Cows, the Cattle of him the Default. faid R. B. and unjustly detained them, a-Lilly's Entr. gainst Sureties and Pledges, &c. as he al-637. ledged; and the faid R. afterwards made Default in our faid Court before us; wherefore it was confidered in our fame Court before us, that he and his Pledges for profecuting should be amerced, and that the faid T. might depart the Court without a Day, and should have a Return of the Cattle aforesaid: Therefore we command you, That without Delay you return the faid Cattle to the faid T. and you shall not deliver them at the Complaint of the faid R. without our Writ, which shall expresly mention the said Judgment; and in what Manner you execute this Writ, you shall make appear to us in three Weeks from the Day of St. Michael, wherefoever, &c. And have you there this Writ. Witness, &c.

## Second Deliverance.

# K. B.

cond Deliver-Thef. Brev. 503.

A Writ of Se- CEORGE the Second, To the Sheriff of Effex, Greeting: If T.W. shall give you Security that he will profecute his Claim, and also to return the Cattle, (\* which in our Court before us were lately adjudged to T. J. through the Default of the faid T. W.) if a Return thereof shall be adjudged; then do you cause those Cattle without Delay, (or forthwith) to be delivered to the faid T.W. and by Sureties and fafe Pledges compel the faid T. J. that he be before \* us in three Weeks from the Day of St. Michael, wherefoever we shall then be in England, to answer to the faid T. W. for taking and unjustly detaining the Cattle aforefaid; and have you there the Names of the Pledges, and this Writ. Witness Philip Lord Hardwicke, the 28th Day of November in the ninth Year of our Reign.

## K. B.

Another Form. Thef. Brev. 303.

GEORGE the Second, &c. To the Sheriff of Effex, Greeting: If C. D. shall give you Security that he will profecute his Claim, and also return the Cattle which in our Court before us were lately adjudged to A. B. through the Default of the faid C. We command you, That if by Means of our Writ de Retorn' Habendo lately directed to you for that Purpose, you have made a Return of the said Cattle to the said C. D. then do you cause them to be delivered to the said C. D. and by Sureties and safe Pledges compel the said A. that he be before us on the Octaves of St. Hillary, wheresoever we shall then be in England, to answer to the said C. for taking and unjustly detaining the Cattle aforesaid; and have you there the Names of the Pledges, and this Writ. Witness, &c.

### K. B.

7. F. by A. B. his Attorney, offers (or The Entry of tenders) himself on the 4th Day against an Award of W. T. of a Plea, (or in an Action) where-this Writ. fore he took the Cattle of the faid W.T. and unjustly detained them, against Sureties and Pledges; and he came not, and the Plaintiff was there, &c. Therefore he and his Pledges, to wit, John Doe and Richard Roe, are amerced, &c. and the Misericordia. faid T. F. may depart the Court therefrom without a Day, &c. and may have a Re-Sine die. turn of the Cattle aforesaid, &c. and afterwards, (to wit) on the Octaves of St. Martin then next following, before our Sovereign Lord the King at Westminster, comes the faid W. by J. B. his Attorney, and by Virtue of the Statute in fuch Cafe made and provided, prays his Majesty's

Writ of Second Deliverance, &c. and it is granted him, &c. returnable on the Octaves of St. Martin, wherefoever, &c. the same Day is given to the faid T. F. &c.

The Difference between this Writ in the Common Pleas from the former, is no otherwise than at the first Asterisk in the first Writ before, you say, which in our Court before our Justices at Westminster were adjudged to T. J. through the Default of the said T. W. And at the second Afterisk you say, that he be before our Justices at Westminster, in three Weeks from the Day of St. Michael, to anfwer, &c.

Thef. Brev. 303.

A Writ of Second De-Bail taken. Offic. Brev. 348.

PEORGE the Second, &c. To the Sheriff of Esfex, Greeting: Because Lewis liverance after B. in our Court before our Justices at Westminster, hath given you Security that he will profecute his Claim, and will also make a Return of those Cattle which in our same Court were adjudged to Stephen R. through the Default of the faid L. if a Return thereof be adjudged to him: Therefore we command you, That without Delay you cause a Mare which you have taken in Withernam, of the Cattle of the faid L. to the Value of the Cattle formerly taken, to be delivered to the faid L, and compel the faid S. by Sureties and fafe

fafe Pledges, that he be before our Justices at Westminster on the Octaves of St. Hillary, to answer to the said L. for taking and unjustly detaining the Cattle aforesaid; and have you there the Names of the Pledges, and this Writ. Witness Sir Thomas Reeve, Knight, the 28th Day of November in the ninth Year of our Reign.

BY Virtue of this Writ to me directed, The Return I have caused to be delivered to the of a Writ of within named L. his Cattle within mentioned, as I am within commanded to do:

The Pledges within named are John Denn and Richard Fenn.

J. D. Esq; Sheriff.

#### Capias in Withernam.

GEORGE the Second, &c. To the Sheriff of Suffolk, Greeting: Whereas we lately commanded you by our Writ, that whereas T. B. Gentleman, had been attached by our Writ of Second Deliverance, to appear in our Court before us, to answer to J. S. in an Action, wherefore he took the Cattle of the said J. and unjustly detained them against Sureties and Pledges, and the said J. S. in our same Court made Default; wherefore it was considered in our same Court, that the said T. B. should depart hence without a Day, and that the

faid 7. S. and his Pledges for profecuting should be amerced; and that the faid T. B. should have a Return of the Cattle aforefaid irreplegiable; and that you without Delay should make a Return of those Cattle to the faid T. B. to be detained by him irreplegiable; and in what Manner you should execute that Writ, you should make known to us [ fuch a Return] wherefoever we should then be in England; and you at that Day returned to us, that the Cattle aforesaid were eloined by the said T.S. to Places unknown to you, so that you could not return or deliver those Cattle to the faid T. B. as you was commanded by the faid Writ; therefore we command you, that you take fo many Cattle of the faid 7. S. to the Value of the Cattle aforesaid, before taken by the faid 7. S. in Withernam, and deliver them to the faid T. B. to be kept by him irreplegiable, until you can make a Return of those Cattle before taken, to the faid T. B. and in what Manner you shall execute this our Mandate, do you make appear to us on the Octaves of St. Hillary, wherefoever we shall then be in England; and that you cause further to be done therein, what of Right, and according to the Laws and Customs of this our Kingdom of Great Britain, we shall see meet to be done; We also command you, that if the faid T. B. shall make you fecure of profecuting his Claim, and of returning

turning the Chattels aforesaid, if a Return thereof should be adjudged, then do you compel the faid J. S. by Sureties and fafe Pledges, that he be before us [ fuch a Return] wherefoever we shall then be in England, to answer as well to us for the Contempt, as to the faid T. B. for his Damage and Injury done him in this Case: And have you there this Writ. Witness, &c.

EORGE the Second, &c. To the She- A Capias in Withernam, riff of E. Greeting: Whereas we have upon a Writ often commanded you, that you should of Pluries Rejustly and without Delay grant a Replevin plegiari Fato R. E. of his Chattels (to wit) of those cias. which T.T. and J. C. had taken and unjustly detained (as it is faid) according to our Writ before delivered to you, or that you should be before us [ fuch a Return] wherefoever we should then be in England, to fhew us a Reason, why you neglected to execute our Mandates fo often directed to you: And you at that Day made a Return to us, that the Chattels aforefaid were eloigned by the faid T. T. and J. C. out of your Bailiwick to Places to you unknown, fo that you could in no wife grant a Replevin thereof to the faid R. Therefore we command you, &c. [as in the former].

compared Object aforce

A Capias in Withernam, upon a Retornum Habendo, after an Avowry and a the Party for the Damages.

GEORGE the Second, &c. To the Sheriff of the City of G. Greeting: Whereas J. P. was lately fummoned in our Court before us, to answer to J. W. of a Plea [or in an Action] wherefore he on the 28th Ca.Sa. against Day of April [in such a Year] at the City of G. (to wit) in a Place there called P. had taken the Cattle of the faid 7. to wit, The Declara- twenty Sheep, and impounded and unjustly detained them, against Sureties and Pledges,

tion.

Default.

Misericordia.

Sine die.

Cattle.

Second Deliverance.

until, &c. (as he declared); and the faid J. P. appearing in our faid Court, for a certain Reason therein alledged by him, The Avowry. Well avowed the Taking of the faid Cattle in the faid Place where, &c. to be just, &c. for Damage Feasant therein; and the faid J. W. afterwards in our fame Court made Default: Wherefore it was confidered there, that they and their Pledges for profecuting should be amerced, &c. and that the faid 7. should be dismissed therefrom without a Day; and that he should have a Return of the Cattle aforefaid: Return of the Therefore we lately commanded you, that you should without Delay make a Return

> of the Cattle aforesaid to the said J. P. and that you should not deliver them at the

> Defire of J. W. without our Writ, which should expresly mention the Judgment aforesaid; and in what Manner you should execute that Precept, you should make appear to us [on the Return] wherefoever we should then be in England; We also

> > lately

lately commanded you, that according to the Statute in fuch Case made and provided, you should diligently inquire by the Oaths of honest and lawful Men of your Bailiwick, what Damages the faid 7. P. hath fustained, as well by Reason of the Premisses, as for his Expences and Costs laid out by him about his Suit in that Behalf; and that you should return to us at the Time aforefaid, the Inquisition which you should take thereon, under your Seal and the Seals of those Persons by whom you should take the Inquisition, together with this Writ; and you at that Day re- Elongata returned to us, that the faid Cattle had been turned by an eloigned by the faid J. W. to Places unknown to you; for which Reason you could not return those Cattle to the faid J. P. and you also returned a certain In-Inquisition. quisition taken before you in the City of G. in the County of the faid City, on the 19th Day of April [in such a Year] whereby it was found, that the faid J. had fustained The finding Damages by Reason of the Premisses, be- of the Jury. fides his Expences and Cofts laid out by him about his Suit in that Behalf, to 10 s. and for his Expences and Costs to 2 d. Therefore it was adjudged, that the faid Judgment. J. P. should recover against the said J. W. his Damages aforefaid found by the Inquifition aforefaid; and also 10 l. awarded by our Court before us, to the faid 7. P. for his Expences and Costs by way of Increase; which faid Damages in the Whole amount-Aa3

#### APPENDIX.

Withernam.

ed to 10 l. 10 s. 2 d. and that the faid 7. W. should be amerced; Therefore we command you, that you take fo many Cattle of the faid J. W. in your Bailiwick, in Withernam, and without Delay cause them to be delivered to the said 7. W. to be detained by him irreplegiable till he will make a Return of the faid Cattle before taken to the faid J. B. and in what Manner you shall execute this our Writ, do you make appear to us on the Octaves of St. Hillary, wherefoever we shall then be in England: We command you also, that you take the faid J.W. if he shall be found in your Bailiwick, and keep him fafely, fo that you have his Body before us at the Time aforesaid, wheresoever we shall then be in England, to fatisfy the faid J. P. for the Damages aforefaid; and have you there then this Writ. Witness, &c.

Ca. Sa.

Thef. Brev.



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Is

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Upon Nonsuit of the Plaintiff, the Return
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But this being inconvenient was remedied
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gives the Writ of fecond Deliverance.  Page 233
If the Defendant in second Deliverance hath Judgment, whether by Nonsuit of the Plaintiff, by Abatement of the Writ, or by Discontinuance of the Plea, the Defendant shall have Return irreplevisable.
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visable.  240  If the Plaintiff confesseth the Defendant's Plea to the Writ, Defendant shall have Return, but not irreplevisable.  240  Where Returno Habendo shall go against Pledges Cattle.  242

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# Second Deliverance.

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### Seifin.

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If Lessee for Years distrains the Beasts of a Stranger, he must lay the Seisin in his Lessor.  Page 188  If a Termor avows for Rent on his under Tenant by Deed indented, he need not
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If he distrains Cattle Damage Feasant, and the Owner brings Trespass, he must lay a Seisin.  190  Avowant for Damage Feasant, lays the
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How he may avoid such Incroachment by Writ or by Plaint.

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The Pluries Replevin always determines the Sheriff's Power.

If the Plaintiff be Nonfuit, and a Retorm Habendo awarded, and the Sheriff levies Goods on a Withernam, and won't deliver them to the Defendant, an Action lies.  Page 108 N Cannot return to a Pone that the Cause is
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Must be made before impounding, or the
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10 8 cm 20 mm 20 0 0 0 220
Or where the very Tenant hath the Deed
whereby they were reserved in his Pow-
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No Seisin of Services traversable but of such as are laid in the Avowry.

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Or those of a higher Nature which are included.

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Wherever in former Times a Tender was proved, the Lord might wage his Law.

#### Withernam.

Part of the Lex talionis. Twofold in the County Court and Courts above. In the County Court if the Bailiff return Elongata, the Withernam did not issue before the Sheriff held an Inquest. 93 In the Courts above it issues on the Sheriff's Return. Could not iffue on a Suggestion. 95 N. It issues out of the Court where the Pluries is returnable, and not out of Chancery. Therefore if Elongata be returned on the Alias into Chancery, it issues out of Chancery, and is returnable in B. R. or C. B. Form of Withernam. 95, 96 Not

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